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PIANO PLAYING IN ADJOINING FLAT AT UNSEASONABLE HOURS AS CONSTITUTING A NUISANCE.

Our complex city life is resulting in increased litigation of a character not even imagined a few centuries ago. Who among the great grandfathers of the present generation would have thought that it would ever be charged that piano playing was a nuisance. And yet such is the fact; at least it has been alleged in petition and on the witness stand that the unreasonable indulgence of this art causes much annoyance and discomfort to people who are living in the modern flat, that institution, indeed, which is fast making the sweet associations of real home life, a mere memory of the past. In these pigeon-hole residences of our large cities it is sometimes the case that—

> Neighbors to right of us,
> Neighbors to left of us,
> Neighbors above us
> Volley and thunder.

It is no wonder therefore that neighbors in such apartments should disagree as to the propriety of the hour or the time when certain musical instruments, such as a piano, should be permitted to express themselves in their usual way.

In the Southwestern Police Court of the city of London, recently, a gentleman complained to the magistrate of the annoyance caused to him by a neighbor, who occupied the adjoining flat, playing the piano at all hours of the day and night. The music had seriously disturbed his rest The magistrate, who is the author of a work on the Law of Nuisances, is reported to have said that the courts had decided that a neighbor need not consider or comply with the wishes of those living next door. In commenting on this decison the *Solicitor's Law Journal* says: "We can scarcely think that the decisions bear out this view of the law, but there is little to encourage a householder who proposes to bring an action for damages or an injunction against a noisy neighbor. The courts are unwilling to interfere, and have a great deal to say about neigbourly feeling and the advantage of forbearance and compromise. In some of the foreign towns pianoforte playing is only allowed during certain hours of the day, but to propose such a restriction in the metropolis would scarcely add to the popularity of the county council. It may be necessary before long to appoint a commission to inquire into the noises of London and the best means available for their limitation or suppression."

WHETHER A DECOY SOLICITOR EMPLOYED BY THE COUNTY ATTORNEY IS EXEMPT FROM PUNISHMENT.

Where a co-partner in the commission of a crime turns state's evidence he generally secures immunity from punishment for his own offense. Indeed, this is the law by statute in some states, as, for instance, in Texas, where the supreme court of that state had opportunity recently to apply the statute to a very peculiar state of facts. It is the recent case of Gaines v. State, 78 S. W. Rep. 1076, to which we now refer. In that case appellant was convicted of gaming. The state's case was fully made out by the evidence. Appellant relied upon an agreement with the county attorney by which he was to be exonerated frm punishment. The facts in this connection show that appellant made an agreement with the county attorney by which he was to induce other parties to engage in gaming, or participate in games with any one who would play, report them to the county attorney, and be used as a witness for the prosecution in such cases. He further alleged that heengaged in two or more games, and stood ready to testify against these parties, and so informed the county attorney. The county attorney did not see proper to use him, but prosecuted him for engaging in the games. His contention was that these relations exempted him from punishment, and he raised the question by special plea, and by charge asked of the court. The court in passing upon this exceptional state of facts held that such an agreement to commit crime as was disclosed in this case was not such as would exempt the defendant under the statutes granting immunity to state's witnesses. The court said, in explanation of its decision: "Whenever a party is used by the state as a witness in gaming cases, he is released by the statute from punishment in the

case in which he testifies or is used, whether that testimony is given before the grand jury, trial court, or examining court. But so far as we are advised, this only relates to cases where the offense has been committed, and one of the participants is used as a witness. We have found no case, and we are cited to none, which is based upon a previous agreement to engage in violations of the law for the purpose of playing detective, or in bringing about violations of the law in order that he may testify. We do not believe the statute was intended to cover such cases. Nor can an agreement or conspiracy of this sort, entered into between the county attorney and one or more parties, be brought within the terms of the statute. The law did not contemplate the giving of its sanction, either directly or inferentially, to conspiracies or agreements of this sort. The county attorney and the witness cannot enter into agreements to bring about violations of the law, and the witness claim by force of this agreement the benefit of exemption. The county attorney did not see proper to use him as a witness. The county attorney, by reason of his official position, has no right to induce parties to commit crime; and neither he, nor the parties engaged in the crime by virtue of this agreement, would be exempt from punishment. The officer has no more exemption under such circumstances than the parties to the game. The county attorney might use the witness, under the terms of our statute, and exonerate him; but that does not grow out of the mere fact of the previous agreement. The law does not recognize the right of the county attorney or other parties to enter into agreements to bring about violations of the law for the purpose of securing convictions. We know of no authority upon which appellant can predicate the defense set up."

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—RULE OF CONTRIBUTORY NEGLIGENCE AS APPLIED TO CHILDREN.—What is the test of a child's contributory negligence? That is the question which arose in the recent case of Eagle & Phenix Mills v. Herron, 46 S. E. Rep. 405. The supreme court of Georgia answered the question by setting up not the usual standard of care taken by children but the child's actual "mental capacity." On the question of contributory negligence, the court charged that "if the plaintiff in the exercise of such care as his mental and physical capacity fitted him for exercising in the actual circumstances under discussion could have avoided injury he would not be entitled to recovery. * * * If you believe that the child, or the plaintiff in this particular case, in the exercise of all his mental capacity, such as he was possessed of at the time, did not know that the same was dangerous, and the accident happened by reason of this defect in the pulley, then he would be entitled to recover."

It is believed, however, that the better rule, both on reason and authority would be to test a child's contributory negligence not by its actual mental capacity, but by the average mental capacity of children of his age; or, in other words, such care will be expected of a child which would be expected of one of his age of average intelligence and prudence. See Robinson v. Railway Company (N. Y.), 91 App. Div. 158.

ATTORNEY AND CLIENT—FEES FOR SETTLING UP AN ESTATE.—The Court of Appeals of Kentucky is indulging in some close calculations as to the value of an attorney's services in assisting in the administration of an estate. The results of these calculations are affecting seriously the incomes of the lawyers of Kentucky. Thus in the recent case of Bickel v. Bickel, 79 S. W. Rep. 215, the attorneys asked for and obtained an allowance of $1,200 but the court of appeals cut it down to $750, for the reasons that all the services charged for were not rendered primarily to the estate, but more for the personal benefit of the executor and individual heirs. The court said: "The appellants also complain that the allowance of $1,200 to the attorneys representing the estate was too large. We are of the opinion that the allowance is too great to be charged against the estate. From the record it appears that the most of their services were rendered in looking after the interest of Henry Bickel (the executor) in trying to hold the title (the heirs) to the Payne street property and all the boys in attempting to sustain the assignment of the life policy and other individual interests of his and theirs. The fee of $1,200 is possibly small for all the services rendered by counsel in this action, but $750 is ample pay for the services they rendered the estate

In another case decided at the same term a fee of $600 for settling an estate was reduced by the trial court to $150 and approved by the court of appeals for the same reasons stated in the previous case. Clarke v. Garrison, 79 S. W. Rep. 240. In explanation of its decision the court said: "In determining what is a reasonable attorney's fee, the court must take into consideration not only the amount of the estate, the character of the services rendered, and the amount of work done, but also, in a case like this, the fact that part of the services are not chargeable to the es-

tate. On the whole case, we cannot say the chancellor erred in fixing the fee at $150, giving to his finding that weight which ought to be given to it in cases of this sort."

It very often happens that attorneys in renderings services to executors are not always careful to scrutinize the character of service rendered and determine whether they really are in the interest of the estate or of the individual executor. It is now observed that he must make this distinction at his peril, or suffer the loss of a large part of his fee.

LIFE INSURANCE—RIGHT OF ONE TAKING OUT A POLICY ON LIFE OF ANOTHER IN WHOM HE HAS NO INSURABLE INTEREST TO RECOVER BACK HIS PREMIUM.—The English case of Harse v. The Pearl Life Assurance Co. (1903), 2 K. B. 92, attracted much interest among life insurance companies, and even greater interest is likely to be felt in the news that the decision has been reversed by the court of appeal, reported elsewhere. The facts according to the findings of the jury, were that the agent of a life assurance company, the defendants, represented to the plaintiff that two policies which he proposed to effect on the life of his mother were good and valid policies, and that in consequence of, and in reliance upon, this representation, he effected the policies. But it was also found that in making this representation the agent was not guilty of any fraud—that is to say, that he made it in good faith, believing it to be true. More than twelve years after these policies had been effected, the plaintiff, being informed that the policies were void under the Life Assurance Act, 1774, inasmuch as the plaintiff had no insurable interest in the life of his mother, brought his action to recover the premiums paid by him during the preceding twelve years.

The *Solicitor's Journal* in recording the course of decision in this case, said: "It may be assumed that, apart from the representation of the agent, the maxim '*in pari delicto potior est conditio defendentis et possidentis*' would have been fatal to the plaintiff's claim, for the courts will not assist an illegal transaction in any respect; but it was strongly argued that the representation, which was made by an agent skilled in insurance matters to a person ignorant of the law, made all the difference. The King's Bench division adopted this view. Channell, J., saying that it must be conceded that if the representation as to the legality of the policies had been fraudulently made, the plaintiff would have been entitled to recover, and that, in his opinion, the fact that the contract had been procured by a statement which, though innocent, was not true, made no difference. This decision has now been reversed by the court of appeal. The master of the rolls referred to the rule of law that where one of two parties to an illegal contract paid money to the other in pursuance of the contract, he could not recover, and—with regard to the plaintiff's contention that he was relieved from the operation of that rule by the representation of the agent of the defendants—said that this representation was a mere statement of opinion as to the law, and that, in the absence of fraud, duress, pressure, or some fiduciary relationship between the parties, a party to an illegal contract who had incurred a loss in consequence of a mistake in law must submit to that loss. We do not wish to offer any opinion as to the merits of the particular case. The delay on the part of the plaintiff was calculated to seriously prejudice his claim. But if the action had been brought immediately after the payment of the first premium, we should have thought that the decision was a hard one. No point was made as to the authority of the agent to make the representation, and we must assume that it was adopted by the company, who, therefore, obtained the benefit of a payment which was made under an error in a material particular."

NEURASTHENIA, THE RESULT OF NERVOUS SHOCK, AS A GROUND FOR DAMAGES.

The popular recognition of neurasthenia as a distinct nervous disease is of comparatively recent date, due to George M. Beard of New York, who first called public attention to it in 1869, and in 1880 published a brochure upon the subject. Previously it was confounded with hypochondriasis or hysteria.

Definition.—It is familiarly known as nervous prostration or nervous exhaustion and is a fatigue neurosis or morbid condition of weakness or exhaustion of the nervous system, a generalized disorder of the entire nerve apparatus, giving rise to various forms of mental and bodily inefficiency.

Etiological Factors.—It is a disease of the highest civilization, and especially of American life, some claim. Others regard it as a disease of all time, and especially of high altitudes and extremes of climatic conditions. Hebrews, Slaves and Scandinavians are subject to it. It is rare in negroes and children. Unmarried males and married females between twenty and fifty years of age most frequently have it. Heredity is an important factor. Parents who have led irrational lives or had nervous or debilitating diseases, transmit a neurasthenic predisposition often, the stamina of the offspring being weakened. Occupations, mental or physical, requiring over work and education, omitting discipline and self-control, develop neurasthenics.

Inciting Causes.—Back of it is often a history of anxiety, worry, excitement, excessive mental strain, business or professional, overstudy, shock, physical or psychic, trauma, exhausting illnesses from acute or chronic diseases, toxic states, as syphilis, lithæmia, excessive verrery, masturbation, the abuse of alcohol, tea, coffee, the use of morphine, cocaine or other drugs, or it may be secondary to and symptomatic of organic diseases, as diabetes, gout, rheumatism, phthisis, uremic and toxic states generally.

Pathological Changes are Few or Absent.—The microscope may reveal the exhausted nerve cells with shrunken nucleii which stain more deeply than normal and their reticulated appearance is lost. The protoplasm surrounding each nucleus is shrunken and stains faintly. Cell outlines are irregular. In cases of death from spinal concussion the brain and cord have shown punctiform hemorrhages and degeneration of the pyramidal tract has followed concussion or injury. There may be multiple sclerosis in white matter and arteriosclerosis of vessels of brain and cord, areas of degeneration in the white substance and in sympathetic garylia have been observed after shock in railway accidents with slight buttock injury.

Objective Symptoms are Few.—The patient's manner of walking and facial expression are often characteristic of psychic, motor and organic fatigue. Muscular power is weakened, tendon reflexes increased, especially knee jerks, there is a fine tremor of hands and knees. Ankle clorus may be present.

Subjective Symptoms Innumerable.—Charcat considers headache, backache, gastro-intestinal atony, neuro muscular weakness, cerebral depression, mental irritability and insomnia as the true stigmata of the disorder. Each type presents a host of symptoms depending on the part of the nervous system most affected.

Cerebral Type.—Mental symptoms predominate. The patient's fixed ideas and morbid fears resemble hypochondriasis. He complains of everything, feels insulted if desires not at once granted. Has little consideration for others and may try to make them uncomfortable. Occasionally the patient is good tempered.

Spinal Irritation. — Lumbar or cervical pains are most prominent and are excited by pressure beside or upon vertebrae. Tenderness is usually found over the spine in all types, sometimes its whole length or in small sensitive spots. Sometimes the skin over the entire back is over-sensitive and it is difficult to sit up or lie down.

Anxiety Neurasthenia. — There is great physical and mental depression. The patient, if a woman, thinks she has committed an unpardonable sin. There are fixed ideas, various phobias or fears develop, arising from a consciousness of weakness and loss of courage, fear of impending insanity, paralysis, death, fear in an open space (agoraphobia), trembles, breaks out into profuse perspiration, seems chained to the ground but can cross the space easily with a child or even a stick; fear of being left alone (monophobia), especially in a closed space (claustrophobia); fear of people and society (anthrophobia): fear high things will fall (batophobia); fear disease (pathophobia); fear a railway journey (sidero dromophobia); fear thunder and lightning (siderophobia or astrophobia.) Or the anxious feeling may localize in some particular part of the body. Anxiety may become so intense, he tosses about his bed, saying he does not know what to do with himself. He may commit suicide.

Neurasthenia Gravis.—Symptoms of depression are most severe. Strength fails, emaciation is extreme, there are digestive troubles, mucus enteritis, complete casts of the bowels are thrown off. He dies from exhaustion or intercurrent affections.

Angiopathic Type.—The chief disturbances are circulatory, shock having disturbed the sympathetic nerves acting on the vaso-motor system and there are flushes of heat (especially in the head) throbbings, chilly sensations, profuse sweats, too rapid heart (tachycardia). Rumpf's sign is present, the heart goes up to 80, 90, 100 beats a minute instead of 70 to 75, the normal count, and remains so several minutes after touching a painful point: asterial throbbing, capillary pulsation in nails, lips, on a line drawn upon the forehead, on veins on back of the hand. The pulse may be water-hammer—comes up full and strong and falls away dead, lifeless. There may be a throbbing aorta, a preternatural pulsation of the epigastrium. In women especially peripheral blood vessels contract, the nose is blue or red, the face looks pinched, the extremities are cold.

Sexual Neurasthenia.—There is irritable weakness of sexual organs, spermatorrhœa, painful testicles, may be impotence. Urinary changes are characteristic of defective metabolism, showing excess of phosphates, with disturbed digestion, urates and oxylate crystals. Often lithaemia is present and polyuria may be or urine may be scanty or high colored. Fluid secretions, saliva, sweat, gastric, intestinal and cynovial fluids may be deficient or much increased or alternate each condition.

Gastric Type.—Has nervous dyspepsia, motor neuroses, as hypermotility or increase of normal activity, the food being discharged into the intestines too early, peristaltic unrest, with gurgling, nervous eructations, vomiting, food may be regurgitated and chewed like a cud; spasmodic contractions of the cardiac orifice of the stomach from too hot or cold food or food too hastily taken, or an insufficiency. Gaseous gastric distension may provoke cardiac palpitation, constipation alternates with diarrhœa.

The neurasthenic headache may be at the base of the brain (occipital), on top the head (parietal), temporal or frontal. The pressure symptoms may be very severe, lead-cap headache, or he may feel as though wind were blowing or water running under his scalp. Backache is common with the headache, streaking up from the small of the back between the shoulders or through the loins and down the limbs. With it is often a drawing sensation in the neck. Palleix's points, a number of points painful to pressure on head, limbs or other parts of the trunk besides the back. There are all manner of abnormal sensations, prickling, tingling, numbness, stiffness, creeping, disorders of hearing, taste and smell, as tinnitus aurium (ringing in the ears) and throbbing, bad taste and smells; visual disturbances, causing headache and blurring of letters after a few minutes reading due to easy fatigue of the power of accommodation and fatigue of retinal sensitiveness. Muscular asthenopia, photophobia, retinal hyperaesthesia or oversensitiveness may be present. Objects may look misty, strange. Pupils are usually very white, contracting and expanding excessively and independent of light or efforts to accommodate. Involuntary mental activity may be very troublesome when overtired. Thoughts which he cannot control or check may run with lightning-like rapidity through his brain, or a word, number or song run continuously in his head and he cannot banish it. He may be very absent minded. The case is often complicated with hysteria.

Traumatic Neurasthenia is often called railway brain or railway spine, according to the part most affected. Is a morbid condition following shock and may result, according to Ericksen, from inflammation of the meninges and cord.[1] It is the form of most importance from a legal aspect, as railway accidents often cause it, and suits for damages result. Such accidents are less apt to cause it when passengers are asleep at the time of the accident, fright, physical shock, is eliminated and the body is relaxed. If promptly and properly cared for, there is less danger of such a result but immediate return to work and use of stimulants and narcotics favor the development of nervous symptoms and the worry of litigation aggravates them. Many cases are said to be much improved or cured by the award of substantial damages. Others are never cured, but show partial improvement.[2]

The symptoms are chiefly cerebral or spinal as the brain or spinal cord is the seat of the shock. Cardio-vascular changes may be present to a marked degree. Bodily functions may be well performed but digestion may be disturbed and there is loss of weight and appetite. May be exaggerated patellar reflexes, pupils may be unequal, there may be numbness and tingling in the extremities. Some cases have marked hysterical symptoms, as sensory disturbances, herni-anaesthesia (of one-half the body only), the skin of the affected side is pale and cool and a pin-prick there will not draw blood, clavus hystericus, an agonizing pain like driving a nail in the head, on the vertex or at the base of the brain, neuralgias, hysterogenie points on the skin of the thorax and abdomen, pressure upon which may cause convulsive attacks or minor disturbances. In hysterical women, the pains may simulate those of gastralgia, gastriculcer, peritonitis or appendicitis. Some cases suggest organic diseases of brain and cord. There are tender

[1] Church & Peterson's Nervous and Mental Diseases, tit. Neurasthenia. Osler Principles and Practice of Medicine, tit. Neurasthenia.

[2] Dr. Chas. L. Dana in Hamilton's System of Legal Medicine.

points along the spine and on the head. Static ataxia is present (Romberg's sign) and the patient cannot stand with eyes closed and heels together. He sways and in an advanced case, falls forward if not prevented. Traumatic neurasthenia may not develop for several days or weeks after the accident. The injury may be of nervous shock only. He may not be aware that he is more than shaken up and badly frightened, or he may suffer pain from a bruise or strain. Insomnia, brain fag, headache, mental confusion, muscular weakness, despondency and irritability develop gradually. He declares he is unable to work finally and stays in bed a good deal from pain and weariness. Walking and reading tire him very soon, he has spots before his eyes (*mureae volitantes, tnniitus aurium*), noises in the head. He may have any of the digestive cardia, vascular, sexual or other symptoms previously described.[3] Few cases have been reported in which damages have been asked for nervous shock resulting in neurasthenia, but in quite a number, other troubles have followed, as hysteria,[4] insomnia and nervous troubles,[5] paralysis and neurasthenia,[6] illness has been caused,[7] or a previous illness aggravated,[8] miscarriage,[9] with birth of a dead foetus,[10] or of an idiot child.[11] As the ground of recovery is the same in all it will be proper to review some of them here as they throw considerable light on the subject.

Where Physical Injury Accompanies Shock.—In most cases, there has been a history of a railway collision, actual or imminent, or the plaintiff has fallen into an excavation unlawfully uncovered, or tried to escape from some one cursing and making threats, has been badly frightened and jarred, often has received physical injuries, from the effects of which, combined with nervous shock, the permanent injury complained of and nervous system has followed.[12]

In De Wardener v. Met. St. Ry. Co.,[13] from severe bodily injuries, due to the premature starting of a car he was about to board, the plaintiff lost the permanent use of his left arm, was sick a long time and put to an expense of nearly $3,500.00 for surgeons, physicians and nurses. His means of livelihood were permanently impaired. He developed symptoms of traumatic neurasthenia, was easily tired by reading or walking, his memory was impaired, he became very irritable and small matters irritated him very much. The court said these matters were entirely proper for the jury to take into consideration in assessing damages, but considered $15,000, and the expenses of his treatment a sufficient amount to award him, there being no evidence as to the probable duration of the nervous and mental condition described, no loss of earnings shown and the only permanent injury established by proof that to the left arm.[14] In Lockwood v. R. Co., a woman passenger on defendant's car tried to alight at the terminus of the road. The driver swung the car around on the turntable and the plaintiff fell, striking her back against the rear guard rail injured her sciatic nerve, brought on a return of an old inflammation of the broad ligament sustaining the uterus. She suffered from physical troubles brought about by this injury and doveloped nervous prostration. Her right of action was sustained by the court but a verdict of $10,000 was deemed excessive and it was stated she was not entitled to recover for loss of time or medical attendance, these items of damage being recoverable by her husband. There is, however, an exception to this rule in case the wife is a sole trader

[3] Osler's tit. Tr. Neurasthenia; Hamilton's System of Legal Medicine. Dr. Dana's article.

[4] Homans v. Boston Elv. Ry. Co., Sup. Jud. Ct. Mass., 1902, 11 Am. Neg. Rep. 248; Spade v. Lynn & Boston R. R. Co., 172 Mass. 488, 5 Am. Neg. Rep. 367, 52 N. E. Rep. 747.

[5] Sloane v. R. R. Co., 111 Cal. 668, 8 Am. Neg. Cas. 76.

[6] Bishop v. St. Paul City Ry. Co., 48 Minn. 26.

[7] Razzi v. Varin, 81 Cal. 289.

[8] R. R. Co. v. Lockwood, 79 Ala. 315.

[9] McKeon v. Chicago, etc. Ry. Co., 94 Wis. 477; Purcell v. St. Paul City Ry. Co., 48 Minn. 134.

[10] Barbee v. Reese, 60 Miss. 906.

[11] Dulieu v. White & Sons, 70 L. J. K. B. D. 837.

[12] M. K. & T. Ry. Co. v. Nail, Ct. Crim. App. Tex., June 1900, 8 Am. Neg. Rep. 658; Mo. Pac. Ry. Co. v. Johnson, 72 Tex. 95; Ehrgatt v. Mayor, etc., 96 U. S. 764, citing cases; Reed v. N. Y. Cent. R. R. Co., 56 Barb. (N. Y.) 493; Smith v. Hayes, Sup. Ct. Ohio, March 1900, 7 Am. Neg. Rep. 493; Shaw v. Boston & Worcester R. R., 8 Gray (Mass.), 45; Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334, 12 Am. Neg. Cas. 229; L. & N. Ry. Co. v. Long, 94 Ky. 416, 11 Am. Neg. Cas. 579; Purcell v. Laurer, Sup. Ct. U. S. App. Div. 1897, 1 Am. Neg. Rep. 57.

[13] 1 App. Div. N. Y. 240, 5 Am. Neg. Cas. 639 (1896).

[14] 28 N. Y. St. Rep. 16, 5 Am. Neg. Cas. 755.

but this must be averred in the declaration and shown in the proof.[15]

In Webber v. St. Paul City Ry. Co.,[16] the plaintiff was thrown partly on the floor and against a seat of the street car he was in during a collision with another car. He was seen standing, pale and dazed at the lower end of the car, and later, outside, with a little blood on his handkerchief. He developed traumatic neurasthenia, was unable to be present at the trial of his suit on account of his mental and physical condition. On the first trial, the jury awarded him $9,250 damages. Before the second trial, he died and the evidence given in his favor at that trial was held inadmissible as in the nature of past events. His right of recovery under properly presented evidence, was not questioned.

General Rule of Damages.—Where physical injuries accompany shock, the right of recovery comes under the general and well-settled rule of damages that where there has been a wrongful act or omission on the part of the defendant, an injury suffered by the plaintiff and the wrong-doing and injury sustained bear to each other the relation of cause and effect and the damage is the natural and proximate consequence of the act complained of, exemplary, not punitory damages will be awarded,[17] unless the injury has been wantonly inflicted,[18] for all injuries past and prospective, bodily and mental suffering, medical and nursing expenses, loss of time and power to labor or capacity to earn money, not to exceed the amount claimed in the declaration.[19]

Particular consequences need have been foreseen but the diseased condition must be traced to the injury and must be shown by the preponderance of evidence to be due to the defendant's negligence,[20] but where there is no other proximate cause of the diseased condition or injury except defendant's negligence, such negligence is held to be the proximate cause,[21] and the defendant must show other cause of it if it exists.[22]

Injury the Result of Nervous Shock Alone.—Where, however, the injury complained of resulted from nervous shock alone or accompanied by very slight physical injury, authorities have been in much conflict as to the right of recovery. It has been asserted by some courts that for mere fright or mental anguish caused by the negligent act of the defendant, no damages are recoverable, although physical injury may follow as a natural consequence of mental disturbances.[23]

In Mitchell v. Rochester Ry. Co.,[24] it was said: "Assuming fright cannot form the basis of an action, no recovery can be had from injuries resulting from fright although the result may be nervous disease, blindness, insanity or even miscarriage (as in this case). These results only show the degree of fright or extent of damage. The right of action must still depend on the question whether damages are recoverable for fright."

In Victoria Ry. Com'rs. v. Coultas,[25] where the gatekeeper of the defendant railway negligently invited the plaintiffs, James and Mary Coultas, to drive over a level crossing when dangerous to do so, and plaintiffs sustained physical and mental damages from fright, it was held that mere fright from an impending collision which did not occur, causing nervous shock or mental distress, was not a sufficient cause of action, and that such consequences resulted from the condition and circumstances of plaintiffs rather than the act of the defendants."

In Ewing v. Pittsburg, etc., Co.,[26] it was held that mere fright causing permanent injury to the nervous system is a result too remote to be recoverable in damages against the person responsible for the collision."

[15] Richmond Ry. & El. Ry. Co. v. Bowles, 92 Va. 738, 10 Am. Neg. Cas. 376; Lucas v. Detr. City Ry. Co., 92 Mich. 412.

[16] Sup. Ct. Minn., Jany. 1897, 1 Am. Neg. Rep. 97.

[17] Penn. Ry. Co. v. Books, 57 Pa. St. 339, 4 Daly (N. Y.), 181; 48 N. H. 541.

[18] 60 Miss. 906; 168 Mass. 285; 124 Mass. 580; 155 Mass. 70.

[19] Sherwood v. C. & N. M. Ry., 82 Mich. 374, 4 Am. Neg. Cas. 100; 2 Rorer on Railways, 1098-1099.

[20] Barry v. Mut. Acc. Assn., 23 Fed. Rep. 716, 87 Mo. 422; 25 Am. & Eng. Ry. Cases, 327.

[21] 105 U. S. 249.

[22] 108 Ind. 551.

[23] Mithell v. Rochester Ry. Co., 151 N. Y. 107; Lehman v. Brooklyn City Ry. Co., 47 Hun (N. Y.), 355; Spohn v. Mo. Pac. Ry. Co., 116 Mo. 617, 4 Am. Neg. Cas. 718; Smith v. Postal Tel. Cable Co., 174 Mass. 576, 7 Am. Neg. Rep. 54; Haile v. Texas, etc., Ry. Co., 9 C. C. A. 134, 60 Fed. Rep. 567; Joch v. Dankwardt, 85 Ill. 331; Braun v. Craven, 175 Ill. 401; Canning v. Inhabs. Winstom, 1 Cush. (Mass.) 451; Wyatt v. Leavitt, 71 Me. 227; 6 Nev. 224; 36 Minn. 290; 36 Minn. 90; Scheffer v. U. S. R. R. Co., 105 U. S. 249, 85 Ill. 11; G., C. & S. F. Ry. Co. v. Trott, 80 Tex. 12.

[24] 151 N. Y. 107.

[25] L. R. 13 App. Cas. 222.

[26] 147 Pa. St. 10, 23 Atl. Rep. 340.

In Haile v. Texas & Pac. R. Co.,[27] there was no bodily injury, but the shock and excitement produced insanity owing to the plaintiff's peculiar mental and physical condition. The court said the defendant owed him a duty to carry him safely and not injure his person by force or violence, but did not owe him a duty to protect him from fright and excitement or from any hardship he might subsequently suffer because of the accident.

Rationale of the Rule.—Courts are not in accord as to the grounds on which they base this decision. Some hold that a physical injury is not a natural and probable consequence of a mental emotion, and that the injury in such case is one not reasonably to be anticipated. Others say that a contrary rule would result in a multiplicity of damage suits and intolerable and vexatious litigation.[28] These decisions and kindred ones, which are numerous, seem based on an imperfect knowledge of human anatomy. The nervous system is confounded with the mental processes of the brain, whereas the patient labor of scientists reveal the nervous system as part and parcel of the physical organism, controlling, it is true, its psychological processes—its power to think, to will, to remember, as well as its physical processes, but distinct from such mental processes and controlling them through a mass of nervous tissue lodged in the cavity of the cranium (where it is known as the encephacon or brain), and in the canal made by the vertebræ and the cartilaginous plates between them (where it is called the enyelon or spinal cord), from which cords run to different parts of the body, the sensory and motor nerves, receiving and conveying impressions. More delicate than other parts of the human organism in that it is capable of lasting injury through external impressions without direct physical impact, but always physiological and to be taken into account whenever the extent of bodily damage is to be measured.

As a better understanding of these facts has been reached, the character of text-book writings and decisions has changed. Bevan, an English writer on the law of negligence, has pointed out the difference between mental and nervous shock, limits mental suffering to that caused by the intellectual or moral sense working through the brain and says that for mental pain and anxiety alone unattended by any injury to the person, an action cannot be sustained. Nervous shock almost invariably produces nervous disorder, the terror is merely another expression for a direct effect on the nervous system, a part of the physical organization. He regards an injury self-inflicted through fright actionable whether the subject of terror is man or beast. It is so considered in the beast's case, as where a negligent act apart from impact or actual physical contact frightens a horse and causes him to bolt so that he is injured.[29] He criticises the decision in Victorian Ry. Carriers v. Coultas at length and regards it as a strange conclusion that what is actionable in relation to a horse or an ox may be done with impunity in relation to a human being.[30] Sedgwick and Sutherland also support the affirmative side of the case,[31] and Watson in his work on Personal Injuries said, "the preferable rule is if nervous shock is a natural and proximate consequence of a negligent act and physical injuries result directly from the mental distress, there should be a recovery for the anguish of mind and its consequent physical ills irrespective of contemplated bodily harm."

Is Physical Impact Necessary?—In Ewing v. Pittsburg, etc., Co.,[32] the court said no well-considered case has held that fright alone not resulting from or accompanied by some physical injury to the person, will sustain an action for negligence, but in Dulien v. White & Sons,[33] an English case decided in 1901, where the plaintiff, a woman, was behind her husband's bar, and the defendants driving a van and pair of horses into the house so frightened her that she gave premature birth to an idiot child, it was held she might recover damages for injuries resulting from nervous shock caused by fright, al-

[27] 23 U. S. App. 80, 60 Fed. Rep. 557.

[28] See G. C. & S. F. Ry. v. Hayter, Tex. Sup. Ct. 1900, 7 Am. Neg. Rep. 359,, whre objections met.

[29] Blower v. Adams, 2 Taunton, 314; Manchester S. Junction, etc., Ry. v. Fullerton, 14 C. B. N. S. 57; Conklin v. Thompson, 29 Barb. (N. Y.) 218.

[30] Bevan on Negligence, 77-79-80.

[31] 2 Sedgwick on Damages, 643 (8th Ed.); 1 Sutherland on Damages, 44 (2nd Ed.). See article in 7 Harvard L. J. 304; Sloane v. R. Co., 111 Cal. 668, 8 Am. Neg. Cas. 76.

[32] 147 Pa. St. 40.

[33] 70 L. J. K. B. D. 837.

though there was no actual physical impact upon her person. Damages have been awarded in many instances where nervous shock without physical injury has resulted in bodily or mental injury.[34]

In Sloane v. R. Co.,[35] a woman subject to insomnia and nervous shock and paroxysms, was unlawfully ejected from a train and walked some distance to a town where she borrowed money to continue her journey. She suffered no physical injury at the time but mental excitement brought on her old nervous trouble and her health was seriously impaired. The court, in awarding damages, commented on the liability of the nervous system, a part of the body, to be weakened and destroyed by causes acting primarily on the mind and said if it was thus affected, a physical injury is thereby produced and if the primal cause of the injury is tortious, it is immaterial whether it is direct, as by a blow, or induced through some scheme upon the mind. This case has been quoted at great length and approved by writers.[36] The most exhaustively considered case on this subject is that of the Gulf, Colo. & S. F. Ry. v. Hayter,[37] a Texas case decided in 1900, where the plaintiff acquired traumatic neurasthenia as the result of shock produced by fright. There was a collision between his car, the smoker, and another. The car he was in did not leave the track, but the next car to his and the sleeper were derailed. He was not knocked from his seat or his position disturbed, but was greatly frightened and considerably jarred. He did not realize that he was hurt until he got off the train. The court affirmed the judgment of the court of civil appeals awarding him damages, and said: "Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought in the light of all the circumstances to have been foreseen as the natural and probable consequence thereof." The authorities, *pro* and *con*, were reviewed very fully and the objections on the negative side separately met.

FLORA V. WOODWARD TIBBITS.

St. Paul, Minn.

[34] 48 Minn. 134; 60 Miss. 906; 81 Cal. 289; 11 Am. Neg. Rep. 248; 94 Wis. 477; 79 Ala. 315; Denver, etc., R. Co. v. Roller, U. S. C. C. of App., Seventh Circuit (1900), 100 Fed. Rep. 738.

[35] 111 Cal. 668, 8 Am. Neg. Cas. 76.

[36] Sedgwick on Damages, § 860 (8th Ed.); Bevan on Negligence, 77, 81.

[37] Texas Sup. Ct. 1900, 7 Am. Neg. Rep. 359.

NOTES — PROVISION FOR ATTORNEY'S FEES AS AN INDEMNITY CONTRACT.

DUNOVANT'S ESTATE v. R. E. STAFFORD & CO.

Court of Civil Appeals of Texas, May 5, 1904.

Where the maker of a note agreed therein to pay a certain per cent. for attorney's fees in case it became necessary to place the note in the hands of an attorney for collection, and the holder of the note agreed with the attorney in whose hands it was placed that the attorney's compensation should be the amount stipulated for in the note, the maker of the note could not defeat his liability for attorney's fees on the ground that the amount stipulated for in the note was unreasonable.

Where the administration of a decedent's estate was pending in the probate court, one suing for the foreclosure of a mortgage covering certain live stock belonging to the estate could not in such suit secure an injunction restraining the use of the animals; the probate court having exclusive jurisdiction and control of the management of the property of the estate.

PLEASANTS, J.: Appellee, Sarah E. Stafford, a *feme sole*, doing business under the name of R. E. Stafford & Co., brought this suit against J. A. Robertson and H. R. Byars, joint administrators of the estate of William Dunovant, deceased, to establish a claim against said estate based upon four promissory notes executed by said Dunovant in favor of appellee. These notes are secured by a mortgage upon real and personal property which is fully described in the petition. Each of the notes contains a stipulation for the payment of 10 per cent. attorney's fees if placed in the hands of an attorney for collection after maturity. The petition alleges that, after default had been made in the payment of said notes, they, together with said mortgage, were placed in the hands of appellee's attorneys for collection under a contract and agreement between appellee and her said attorneys by which they were to receive as compensation for their services in enforcing the collection of said notes the 10 per cent. therein stipulated and agreed to be paid for such services; that, acting under their said contract, her attorneys prepared and presented to said administrators a properly prepared and verified claim against said estate for the amount of the principal and interest and attorney's fees due upon said notes, and also for the enforcement of said mortgage; that said claim was presented to the administrators on April 2, 1903, and on April 22, 1903, said administrators, by proper indorsements thereon, allowed the claim to the extent

of the principal and interest due on the notes, and recognized the lien created by said mortgage, but refused to allow the 10 per cent. attorney's fees as stipulated in the notes, and in lieu thereof allowed the sum of $750. Appellee refused to accept the allowance as made by said administrators, and instituted this suit to recover the full amount of the attorney's fees agreed to be paid in said notes. The petition further alleges that the estate is insolvent, and that the value of the property included in said mortgage is not sufficient to pay plaintiff's claim; that the personal property included in the mortgage consists of 300 head of mules, 100 head of horses, and about 200 head of stock cattle; that the administrators have refused to apply for a sale of said property, and are using said mules and horses in the cultivation of a crop upon the farm belonging to said estate; and that, by reason of the hard work to which said animals are being subjected, they are rapidly deteriorating and depreciating in value, and will soon become worthless. It is further alleged that said stock of cattle are wholly uncared for by the administrators, and have become scattered, and many of them lost. The prayer of the petition is for the recovery of the full amount of the principal, interest, and attorney's fees due upon said notes, and a foreclosure of the mortgage upon the property therein described, for an injunction restraining the administrators from further working or using said horses and mules, and for a *mandamus* requiring them to forthwith apply to the county court of Colorado county for an order authorizing them to sell all of the personal property described in said mortgage, and to sell said property as soon as practicable after obtaining such order. The defendants answered by general demurrer and by special exceptions and a plea to the jurisdiction of the court as to that portion of plaintiff's petition seeking relief by injunction and *mandamus*, and further specially pleaded that the contract for attorney's fees contained in said notes was a contract for indemnity, and intended to hold plaintiffs harmless against all reasonable costs incurred in the collection of said notes; that plaintiffs had not contracted with their attorneys to pay them the whole amount stipulated in said notes as attorney's fees, and that, if they had, that such contract was unreasonable and out of proportion to the services to be rendered; and that plaintiffs had not acted reasonably in making said contract. The plaintiff filed special exceptions to the defendant's answer. These exceptions were sustained by the court to that portion of the answer which set up as a defense the unreasonableness of the attorney's fees claimed by plaintiff. The court also sustained defendants' plea to the jurisdiction, and exceptions addressed to the right of the plaintiff to said writs of injunction and *mandamus*. The matters being submitted to the court without a jury, judgment was rendered for the plaintiff for her debt, interest, costs of suit, stipulated attorney's fees, and the establishment of her lien, from which judgment the defendants have prosecuted this appeal.

Upon the trial of the cause the defendants offered to prove that the $750 allowed by them as attorney's fees was a reasonable compensation for the services necessary to be performed by plaintiff's attorneys in the collection of said notes, but the court declined to hear such proof. The amount of the principal and interest due upon the notes at the time of the trial aggregated the sum of $26,212.07, for which amount, with 10 per cent. thereon as attorney's fees, judgment was rendered in favor of plaintiff.

The evidence shows that, under the contract made by plaintiff with her attorneys, they were to receive as compensation for their services the full amount of the attorney's fees stipulated to be paid in said notes. No issue is raised by appellants as to the sufficiency of the evidence to sustain the allegations of the petition; the only question presented by them being whether the trial court erred in sustaining plaintiff's exceptions to defendants' plea that, the contract for attorney's fees being a contract for indemnity, plaintiff was only entitled to recover on said contract an amount sufficient to reasonably compensate their attorneys for the services necessary to be rendered by them in the collection of said notes. The exact question here presented has not, so far as we have been able to ascertain, been decided by our Supreme Court, but we are of opinion that the ruling of the trial court should be sustained. In the cases of Simmons v. Terrell, 75 Tex. 275, 12 S. W. Rep. 854, and Morrill v. Hoyt, 83 Tex. 59, 18 S. W. Rep. 424, 29 Am. St. Rep. 630, it was held that the payee of a note which provided for the payment of 10 per cent. attorney's fees in event suit became necessary for the collection of the note was entitled to recover the attorney's fees against the administrators of the estate of the maker of the note; the services of an attorney being necessary in the prosecution of the claim against the estate. In neither of these cases, however, was any question raised as to the reasonableness of the amount claimed as attorney's fees; the only issue being whether the presentation of the claim to the administrator, and its prosecution in the probate court, was a suit, in the sense in which that word was used in the note. The case of Huddlestone v. Kempner (Tex. Civ. App.), 21 S. W. Rep. 94?, goes no further than the cases above cited. In the cases of Luzenburg v. B. & L. Association, 29 S. W. Rep. 237, and Hammond v. Atlee, 39 S. W. Rep. 600, the Court of Civil Appeals for the Fourth District held that the stipulation in a note for the payment of attorney's fees in event default was made in the payment of the note, and it was placed in the hands of an attorney for collection, was a contract of indemnity, and that the holder of the note would not be entitled to recover the full amount of the attorney's fees stipulated in the note, when it was shown that he had procured

the services of an attorney for a less amount, but could only recover the amount agreed to be paid by him to his attorney. The Supreme Court refused an application for writ of error in both of these cases, but in Luzenburg's Case the application does not appear to have been made by the party against whom the ruling above quoted was made. From the statement of the case in the opinion of the Court of Civil Appeals in Hammond v. Atlee, *supra*, in refusing the application for writ of error the Supreme Court must have approved the holding of the Court of Appeals upon the question we are now considering. The case of Bank v. Smyth (Tex. Civ. App.), 30 S. W. Rep. 678, was decided upon the theory that the stipulation in a note for a definite amount as attorney's fees in the event of a default in the payment of the note was a contract for the payment of liquidated damages, and should be enforced as such. This doctrine is supported by high authority, but since the refusal of the application for writ of error in the case of Hammond v. Atlee, *supra*, it cannot be regarded as the rule of decision in this state.

The contract for attorney's fees being one for indemnity, and not for the payment of liquidated damages, it would necessarily follow that, when the holder of the note procured an attorney for a less sum than that stipulated in the contract, he would only be entitled to recover from the maker of the note the amount actually paid or contracted to be paid by him for the services of the attorney. Conceding this to be the law, it does not follow that when the maker of the note has agreed to pay 10 per cent. attorney's fees, and the holder of the note, acting under this agreement, employs an attorney, and contracts to pay him said amount for his services in collecting the note, the maker can defeat his liability therefor on the ground that the amount is unreasonable. He has authorized the holder to contract for the payment of 10 per cent. for the collection of the note, and in the absence of allegation and proof of fraud or mistake in making the note, or of fraud against the maker in the execution of the contract between the holder and his attorney, he is estopped from saying that the amount which he has agreed the holder of the note might contract to pay his attorney is unreasonable.

We think the case presented is distinguished from one in which the holder of the note has secured the services of an attorney for a less sum than that stipulated in the note. To allow a recovery in the case stated for the full amount of attorney's fees specified in the note would add to the contract of indemnity, and permit the holder of the note to recover from the maker that which the latter never agreed to pay, and which in many cases would amount to a usurious charge for the use or detention of money. On the other hand, to permit the maker of the note, in the absence of fraud or mistake, to avoid his contract for the payment of 10 per cent. attorney's fees on the ground that such amount is unreasonable, when the holder of the note, acting under said contract, has bound himself to pay 10 per cent. attorney's fees for the services of the attorney employed by him to enforce the collection of the note, would be manifestly unjust and unfair to such holder. In such case the holder would, in the absence of fraud or mistake, be bound to his attorney for the payment of the amount agreed upon, and upon the same principle the maker of the note should be held bound to indemnify him to the extent of the amount stipulated in the note.

By cross-assignment of error the appellee assails the ruling of the trial court in sustaining appellants' exception and plea to the jurisdiction of the court, to that portion of the petition which sought to enjoin appellants from using horses and mules upon which plaintiff held a lien to secure the indebtedness claimed in this suit, and to *mandamus* appellants to obtain an order of sale for said animals and the stock of cattle covered by said lien. The county court of Colorado county, in which the administration of the estate of William Dunovant is pending, has exclusive jurisdiction of said estate, and the control and management of the property of the estate by the administrators appointed by that court cannot be interfered with by any other court. If the allegations of appellee's petition entitled her to the relief sought, such relief could only be obtained by proceedings instituted in the court in which the administration is pending.

We are of opinion the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

NOTE. — *Collection of Attorney's Fees Stipulated for in Negotiable Paper.*—A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for each fee to each and every subsequent holder thereof. Bank of British North America v. Ellis, Fed. Cas. No. 859, 6 Sawy. 96; Moore v. Staser, 6 Ind. App. 364.

A stipulation in a note to pay "all costs for collecting the above, not less than ten per cent." includes an attorney's fee for bringing suit. Williams v. Flowers, 90 Ala. 136, 7 So. Rep. 439, 24 Am. St. Rep. 772; Montgomery v. Crossthwait, 90 Ala. 553, 8 So. Rep. 498, 12 L. R. A. 140; McGhee v. Importers' & Traders' Nat. Bank, 93 Ala. 192, 9 So. Rep. 734.

As to the right to collect the fee stipulated for it seems that the fact of prior attachments on such notes before maturity does not deprive the payee of the rights to collect the fees in case of non-payment on maturity. Munn v. Bank, 109 Ala. 215, 19 So. Rep. 55. Nor can the maker escape liability for attorney's fees by tendering the amount of the note before suit is actually brought. Moore v. Staser, 6 Ind. App. 364, 32 N. E. Rep. 563; Johnson v. Romaine, 8 Ind. App. 390. But see *contra:* Osborne v. Smith, 18 Fed. Rep. 126; Pinney v. Jorgenson, 27 Minn. 26. Attorney's fees are not collectible, however, when a part of the collateral contract and not of the note. Ware v. City Bank, 59 Ga. 840. So also, although an attorney's fee

may be authorized in a power of attorney attached to a promissory note, in case of a confession of judgment under the power, this will not justify the court in allowing such fee in an ordinary suit on the note. Doroty v. Holtz, 85 Ill. 525; De Coursey v. Johnston, 134 Pa. St. 328. If the payee is compelled to file a claim in the probate court, he is entitled to attorney's fees. Davidson v. Vorse, 52 Iowa, 384, 3 N. W. Rep. 477. Attorney's fees however are not allowable on a judgment by confession where they are stipulated for, "if suit were brought," or where the sum is paid into court on maturity. Dullard v. Phelan, 83 Iowa, 471, 50 N. W. Rep. 204; Appeal of Moore, 110 Pa. St. 433. The fact that the maker is garnished at the time of suit on note does not relieve him from obligation for attorney's fees. Braham v. Bank, 72 Miss. 266, 16 So. Rep. 203. The fact that an action is brought, and defendant pleads the general issue shows the conditions have arisen which justify a charge for attorney's fees. North Bank v. Gay, 114 Mo. 203, 21 S. W. Rep. 479; Exchange Bank v. Tuttle, 5 N. Mex. 427, 23 Pac. Rep. 241. To similar effect: Jefferson Lumber Co. v. Williams, 68 Tex. 656; Simmons v. Terrell, 75 Tex. 275. Where defendant assumes payment of a note executed by plaintiff, he is not liable for attorney's fees in an action by plaintiff to compel defendant to pay the note. Galvin v. Milling Co., 14 Mont. 508, 37 Pac. Rep. 366.

How much is recoverable under such a stipulation? It has been held that to entitle plaintiff to attorney's fees he must prove an amount incurred for such fee. Pattillo v. Alexander, (Ga.) 22 S. E. Rep. 646. It has been held, also that a stipulation for 10 per cent. additional for attorney's fees means a reasonable fee. Campbell v. Warman, 58 Minn. 561, 60 N. W. Rep. 668.

It has been held that a stipulation of the character now under consideration in this annotation imports an agreement for liquidated damages, and not a penalty. McIntire v. Cagley, 37 Iowa, 676.

JETSAM AND FLOTSAM.

EVIDENCE OF ACCUSED PERSONS.

A statutory rule prohibiting comment by the prosecuting counsel upon the failure of the accused, either to testify on his own behalf, or to call his wife as a witness in a criminal case, is contained in the Canada Evidence Act, 1893, sec. 4. This was viewed as prohibitive, and not as directory only, in the Nova Scotia case of The Queen v. Corby, 1898, 1 Can. Cr. Cas. 457, and its infraction resulted in a conviction being set aside and a new trial ordered. The same doctrine was applied in the more recent decisions of The King v. Hilt, 1903, 7 Can. Crim. Cas. 38, by the Supreme Court of Nova Scotia, although the prisoner's counsel was the first to comment on the absence of the prisoner's wife as a witness. The prisoner's counsel had there suggested in his address to the jury an explanation of the failure to have the wife present as a witness at the trial, and the prosecuting counsel was thus led into commenting in answer. The court granted a new trial, holding that the section specified is an absolute mandate.

The same rule is contained in the Criminal Evidence Act, 1898 (Imp.), and that act is also silent as to what is to be the result should the prosecution disregard the prohibition. But it is interesting to note that in Scotland a different interpretation is given to it from that which obtains here.

The *Law Times* (England), in a recent issue, says: "The learned editor of the last edition of Best on Evidence expresses the opinion (at p. 521) that any comment by the prosecution on an accused person's failure to go into the box would be sufficient to vitiate the proceedings and render voidable any conviction obtained. As appears from two decisions, reported in the last issue part of the Session Cases, the judges of the High Court of Judiciary are not disposed to take so serious a view of the consequences of disobedience to the statutory injunction. In each of the two cases in question it was sought to set aside a conviction on the allegation that the prosecutor had commented upon the fact that the accused had not given evidence on his own behalf, but in each case the judges, while stating that the statutory direction ought to be scrupulously observed nevertheless thought that the mere fact of its transgression was not enough to entitle the accused to acquittal, and they accordingly refused to quash the convictions. Ross v. Boyd, 5 F. (J. C.) 64; M'Attee v. Hogg, 5 F. (J. C.) 67. Both appellants cited the case of Charnock v. Merchant, 82 L. T. Rep. 89 (1900), 1 Q. B. 474, where a conviction was set aside because the prosecutor, in disobdience to another direction of the statute, asked an accused who had tendered himself as a witness whether he had been previously convicted, which question the accused answered in the affirmative. The court, however, regarded this case as distinguishable, inasmuch as the prosecutor's disregard of the statute had there resulted in the admission of incompetent evidence, which was a different matter from the making of incompetent or improper observations. The result seems to be that the statutory direction that no comment is to be made on the accused's failure to give evidence stands, in Scotland at least, as a bare injunction and nothing more." It occurs to us, however, that the statute is more than a mere exhortation, and the better view, it seems to us, is the one propounded in the Nova Scotia cases above referred to.—*Canada Law Journal.*

THE ALABAMA STATE BAR ASSOCIATION.

The 27th annual session of the Alabama State Bar Association was held in the City of Montgomery on July 8th, and at Jackson's Lake, near Montgomery, on July 9th. The meeting on July 8th was held in the hall of the House of Representatives, and was presided over by Mr. Edward de Graffenreid, of Greensboro, Alabama. In the course of his address the president of the association called attention to the changes in the laws by the legislature of Alabama, and among other things called attention to the law in reference to increasing the number ofjudges of the supreme court. Mr. de Graffenreid said:

"Attention is called to the act to better provide for the work of the supreme court, approved October 10th, 1903. By this act the supreme court will consist of six associate judges and the chief justice, to sit in sections of four judges. The chief justice is to be a member of each section, and its presiding justice. The concurrence of four judges in the determination of any cause shall be sufficient, except in causes in which by reason of disqualification the number of judges competent to sit therein is reduced to five or to four in which case such reduced number shall constitute the court and the concurrence of three judges shall be sufficient.

By virtue of this act we have, therefore, to all practical purposes, two supreme courts of four judges each, with power to determine all questions, except that no former adjudication of the court shall be overruled or materially modified except upon the consultation of the court as a whole; and with the further exception that when there is a dissent in a section

upon any material question, the same shall be considered and determined *in banc*.

The rapid increase in business of the supreme court rendered it necessary that the number of the judges should be increased and as experience has clearly demonstrated that four judges can dispatch more business in a given length of time than a larger number, the wisdom of dividing the court into sections is apparant. As there are dissenting opinions only in about 10 per cent. of the cases adjudicated by our supreme court, and the former adjudications of the court are generally adhered to, the necessity for the court to sit *in banc* will not frequently arise, and then, only in cases of grave moment, or in cases involving troublesome and doubtful questions of law.

I feel that the present arrangement is eminently wise, and that the profession and the people generally are to be congratulated upon the readjustment of the court."

The annual address was delivered by the Honorable Fabius H. Busbee, of Raleigh, N. Car., his subject being "The Southern Lawyer and the Negro."

Mr. C. P. McIntyre, of Montgomery, Ala., read a paper upon "Civil Procedure."

Mr. H. E. Gipson, of Prattville, Ala., read a paper upon "The Delay of the Law as an Excuse for Lynching."

The report of the committeeJon Legal Education was submitted by Mr. A. S. Vandegraff, of Tuscaloosa, Ala., and the committee took occasion to criticise the action of the trustees of the Universty of Alabama, in reducing the salary of the dean of the law school from $2,500 to $2,000 annually, and also the action of the trustees in adopting a resolution that the announcement of a member of the faculty as a candidate for an office would *ipso facto*, vacate the position he held. The action of the board of trustees was aimed at Honorable W. S. Thorington, dean of the law school, who in the recent democratic primary, was a candidate for the Supreme Court of Alabama.

At the meeting held on July 9th at Jackson's Lake, Honorable Thomas R. Roulhac, U. S. District Attorney for the Northern District of Alabama, was elected President of the Alabama State Bar Association for the coming year. At this meeting the Central Council of the association made its report which discussed the effect of the recent "Disbarment Act" passed by the legislature of Alabama, on October 3d, 1903, and the Central Council reported that through the instrumentality of the Central Council, two lawyers had surrendered their licenses, and had been disbarred by the Supreme Court, and that two others had surrendered their licenses, but that the Supreme Court had not yet entered an order of disbarment. Quite a discussion arose before the association as to whether the names should be published, and after considerable argument, it was decided to give the names out for publication. A resolution was also adopted by the association, requesting congress to provide for an additional judge in the Northern District of Alabama. A paper was read by Col. Sam Will John, of Birmingham, Ala., upon "A Just and Fearless Judge —John Moore." Judge Moore was one of the Circuit Judges in Alabama, and had very recently died. Mr. F. M. Purifoy, of Birmingham, Ala., read a paper upon "The Growth and Development of the Right and Power of Trust Companies." After the meeting a barbecue was given to the association, which was greatly enjoyed by the members.

CORRESPONDENCE.

HYPNOTISM AS A GROUND FOR CANCELLATION OF DEED.

To the Editor of the Central Law Journal:

The following is a copy of the allegations of an answer which I filed in an ejectment case wherein I set up hypnotism in order to cancel the deed relied upon in ejectment. The cause never came to trial, but was compromised on a basis quite satisfactory to defendant. I have no objection to your publishing it in your journal if you have none.

J. W. HOPKINS.

In the Superior Court of the State of Washington for Clarke County.

G. E. Beeson, plaintiff, v. Julia Beeson, defendant. } Counter Claim.

(Omitting denials of complaint in ejectment.)

Further answering, and by way of counterclaim, this defendant alleges:

1. That the defendant and plaintiff are mother and son.

2. That this defendant now is, and for more than ten years last past, has been the owner of the premises described in the complaint.

3. That on or about December 9, 1899, and while the defendant was temporarily residing at Joplin, Missouri, the plaintiff, then and there being a destitute and poverty stricken person, came to the home of this plaintiff at said Joplin, and took up his residence with her.

4. That at such time, and for a long time prior thereto, the said plaintiff represented and claimed to this defendant that he was a person possessed of supernatural powers and attributes, and was capable of, and in the habit of, holding converse and communication with the disembodied spirits of deceased persons, and with angels, and with the Almighty Himself, and that he, plaintiff, was possessed of the powers of hypnotism, mesmerism and magnetism, and divers other occult, esoteric and mysterious attributes.

5. That immediately upon taking up his residence with this defendant at Joplin, Missouri, as aforesaid, the defendant commenced a system of declaiming, lecturing and preaching to this plaintiff upon the above mentioned powers and attributes, claiming and insisting that he was possessed thereof, and that he was capable of and able to exert the powers of hypnotism upon and over this defendant, and did then and there and in the presence of this defendant, and for he hypnotising her and gaining an undue control over her, practice divers incantations and machinations making at and over her person mysterious passes with his hands accompanied with mysterious speech, and so continued such practices and such declaiming and lecturing in such a continuous and persistent manner that the mind of this defendant became so bewildered and confused that she was at such time deranged in mind and far from being possessed of her normal faculties, and far from being a free moral agent, and at such time the mind of this defendant was wholly and totally under the control of plaintiff.

6. That at such time and while this defendant was so bewildered and confused and deranged in mind and while so under the control of the said plaintiff the said plaintiff further continuing his said incantation and machinations upon this defendant, represented and proposed to her that through his influence with the Creator he could and would cause this defendant to fall into a deep sleep and that dung such

leep and without pain or anguish the soul of this defendant would be caused to depart from its mortal confines to the spirit lands, and this defendant being so bewildered and confused and deranged in mind consented thereto.

7. That upon the defendant consenting as aforesaid to the asportation of her soul, the said plaintiff represented to her that in order to avoid litigation and contention in the civil courts with reference to the property she was about to leave, it was proper and fitting that she make, execute and deliver to him a deed to the real property hereinbefore mentioned, and that it was with his wish and the desire of the spirits and the Almighty that she so do, and that it was her duty to so do.

8. That the defendant being so bewildered and confused and deranged in mind and under the control and influence of the plaintiff as aforesaid made, executed and delivered to plaintiff a deed to the above mentioned property, on February 15, 1900.

9. That immediately upon the execution and delivery of the said deed as aforesaid, the said plaintiff represented to this defendant that in order to successfully accomplish the asportation of her soul to the unknown realms it would be necessary for this defendant to be placed upon a proper diet, and to that end he, the said plaintiff, withdrew from her all manner of nourishment for a period of more than two weeks, and at the end of such time this defendant partially regaining her mental faculties refused to be further starved and accused the said plaintiff of overreaching, cheating and swindling her, and demanded a return of said deed, and thereupon the plaintiff reproached and upbraided this defended for her stubbornness and obstinacy, refused to return said deed, but forthwith decamped and abandoned this defendant in her weak and emaciated condition, carrying with him the said deed which he caused to be recorded, etc. Whereupon defendant demands a decree.

BOOK REVIEWS.

FLANDER'S CONSTITUTION OF THE UNITED STATES.

A very instructive little volume is that written by Henry Flanders and entitled, "An Expositon of the Constitution of the United States," the fifth edition of which has just issued from the press. It is quite unnecessary, of course, to emphasize the importance of the subject-matter treated by this volume. Eloquence has been pored fourth with almost wasteful extravagance on this, the great palladium of our liberties, and it is therefore unnecessary to admonish the people as to the importance of keeping a jealous eye ever upon it. Nor is it necessary to urge upon members of the legal profession the importance of this instrument from a practitioner's standpoint. Every lawyer of any experience, is aware of the multitude of occasions possible in which some provision of that wonderful charter of our liberties, will turn the prisoner free or prevent the enforcement of some unfair or spite legislation on the part of state or municipality, or the denial of some important remedy or redress for wrongs done or contracts violated.

In the present volume it has been the endeavor of the author to supply a convenient manual of instruction to the youth of our country, to make clear and intelligible to the unprofessional reader the fundamental law of our Federative system of government, and at the same time to produce a work which might be useful to the bar. The present edition of this standard work is the latest, and we believe the best, treatise in brief form on the constitution. This statement may be borne out by the fact that the book will be used, as the text book for instruction, at the U. S. Military Academy, West Point, N. Y., as well as in the schools for officers throughout the United States army and by leading colleges and schools in the country.

Printed in one volume of 326 pages and published by T. and J. W. Johnson Co., Philadelphia, Pa.

BOOKS RECEIVED.

A Treatise on Street Railway Accident Law. By Ellery H. Clark, of the Boston Bar. Second Edition. St. Paul, Minn. Keefe-Davidson Company, 1904. Sheep, pp. 625. Price, $5.00. Review will follow.

HUMOR OF THE LAW.

Judge Blueclay—Sheriff, convene the co't. Where is the jury?

Sheriff—Back in the jail yard, your Honah. We happened to get three Frenches and a couple of Eversoles on it, and they're fighting it out, if please the co't.

Judge—Where is the prisoner in this horse stealing case?

Sheriff—The Barnard boys got him out last evening while I was at supper and hanged him.

Judge—Strike off the case, Mr. Clerk. Are the parties to the Salt Lick road case ready to proceed?

Sheriff—It was settled early this morning—they're getting the defendant ready for burial now.

Judge—Well, then, if the district attorney is ready we will proceed with the State v. Hiram Garrard.

Sheriff—If it please the court, the district attorney is not ready. Garrard's counsel carved him with a bowie knife right after breakfast.

Judge (wearily)—Adjourn the co't.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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2. ADVERSE POSSESSION—Possession of Land.—A possession of land held to have been a mere scrambling possession, insufficient to confer title. — Mitchell v. Bond, Miss., 36 So. Rep. 148.

3. ALIENS—Contract for Exchange of Land.—Rev. St. 1899, §§ 4764, 4766, held not to render alien's contract for exchange of property absolutely void, so as to lay basis for suit for rescission on ground of mutual mistake.—Pembroke v. Huston, Mo., 79 S. W. Rep. 470.

4. ALTERATION OF INSTRUMENTS—Burden of Proof.—The burden, on proving an alteration in a bond, does not shift to defendant.—Graham v. Middleby, Mass., 70 N. E. Rep. 416.

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7. APPEAL AND ERROR—Record on Appeal.—Where all the evidence is not in the record on appeal in an equity case, the evidence cannot be considered.—Nelson v. Hall, Mo., 79 S. W. Rep. 500.

8. ARBITRATION AND AWARD—Authority of Attorney. —The attorney appearing for a party to an award had full power to direct that the award as drawn up be put in proper form.—Mississippi Cotton Oil Co. v. Buster, Miss., 36 So. Rep. 146.

9. ATTACHMENT—Effect of General Money Judgment —An attachment lien held not lost by taking a general money judgment without an order for the sale of the attached property.—Coulson v. Saltsman, Neb., 98 N. W. Rep. 1055.

10. BANKRUPTCY—Insolvency.—A company, at the time of giving a mortgage to secure a debt, held not insolvent, within Bankr. Act July 1, 1898, ch. 541, § 1, par. 15.—Empire State Trust Co. v. William F. Fisher Co., N. J., 57 Atl. Rep. 502.

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12. BILLS AND NOTES—Burden of Proving Fraud.—On proof that notes sued on by an indorsee were procured by fraud of the indorser, the burden shifts to the indorsee to prove that he is a *bona fide* holder for value.—First State Bank v. Hammond, Mo., 79 S. W. Rep. 493.

13. BILLS AND NOTES—Forbearance to Sue.—Payment of interest already due on an overdue note will not support a promise of forbearance to sue.—Ferris v. Johnson, Mich., 98 N. W. Rep. 1014.

14. BILLS AND NOTES—Joint Maker.—Where one signs a note on the back in pursuance of a previous agreement, he is a joint maker, and not indorser, even though the note had taken effect prior to his signature. —National Bank of the Republic v. Delano, Mass., 70 N. E. Rep. 444.

15. BONDS—Necessity of Notice to Obligors Before Suit.—Notice to obligors in bond of breach of contract thereby secured held not necessary before bringing suit on bond.—Graham v. Middleby, Mass., 70 N. E. Rep. 416

16. BOUNDARIES—Fee Extending to Center of Street.—Deed presumed to carry fee to the center of the street on which it abuts.—Paige v. Schenectady Ry. Co., N. Y., 70 N. E. Rep. 218.

17. BUILDING AND LOAN ASSOCIATIONS — Deducting Amount from Loan.—The amount deducted from a Loa from a loan association held a voluntary payment by the applicant for the loan.—State Mut. Building & Loan Assn. v. O'Callaghan, N. J., 57 Atl. Rep. 496.

18. CARRIERS—Alighting from Moving Train.—It is not negligence *per se* for a passenger to alight from a moving train.—Harris v. Pittsburgh, C., C. & St. L. Ry. Co., Ind., 70 N. E. Rep. 407.

19. CARRIERS—Alighting Passengers. — Where street car moves suddenly forward while passenger is alighting, the street railway company is liable for resulting injuries, unless it shows that the accident could not have been prevented.—Reagan v. St. Louis Transit Co., Mo., 79 S. W. Rep. 435.

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22. CHARITIES—Litigation Affecting Bequest to City's Poor.—The mayor of a city held not authorized to compromise, without a judgment of the court, a litigation involving a will giving to the poor of the city testator's estate.—Lake v. Hood, Tex., 79 S. W. Rep. 823.

23. CARRIERS—Passenger Injured by Coupling of Car. —Injury to a passenger from a coupling made in an ordinary manner does not justify an inference of negligence on the part of the railroad company.—Yazoo & M. V. R. Co. v. Humphrey, Miss., 36 So. Rep. 154.

24. CHATTEL MORTGAGES—Depositing Goods in Warehouse Outside of State.—Deposit by food company of canned goods in warehouse outside the state held within conduct of its ordinary business, permitted by provision in mortgage.—Anderson v. Anderson Food Co., N. J., 57 Atl. Rep. 489.

25. CONSTITUTIONAL LAW — Defective Acknowledgments.—Laws 1903, p. 120, held not to deprive a subsequent mortgagee or judgment creditor of the vested rights to a priority over a prior mortgage defectively acknowledged.—Steger v. Traveling Men's Building & Loan Assn., Ill., 70 N. E. Rep. 236.

26. CONSTITUTIONAL LAW — Inequitable Statute.—An objection that a statute is inequitable is a matter within the exclusive jurisdiction of the legislature.—Kerr v. Perry School Tp., Ind., 70 N. E. Rep. 246.

27. CONSTITUTIONAL LAW—Legalizing Defective Acknowledgment.—Laws 1903, p. 120, legalizing defective acknowledgment of deeds and mortgages, etc., held not invalid as an exercise of judicial power.—Steger v. Traveling Men's Building & Loan Assn., Ill., 70 N. E. Rep. 236.

28. CONSTITUTIONAL LAW—Sale of Land for Delinquent Taxes.—The sale of real estate for delinquent taxes under Laws 1903, p. 480, ch. 75, does not deprive the owner of property without due process of law, because it fails to provide for personal service.—Woodrough v. Douglas County, Neb., 98 N. W. Rep. 1092.

29. CONSTITUTIONAL LAW—Statutes Affecting Payment of Wages.—Ky. St. 1903, § 2789a, subsecs. 1, 2, 3, relative to payment of miners, held not to operate as an interference with vested rights or an impairment of the obligation of contracts. — Commonwealth v. Reinecke Coal Mining Co., Ky., 79 S. W. Rep. 287.

30. CONTEMPT—Petition for Nullity of Marriage.—A motion to dismiss a petition on the ground that petitioner is in contempt for not complying with the order of cour

is the proper way of bringing the contempt to the attention of the court.—Lind v. Lind, Mass., 70 N. E Rep. 199.

31. CONTRACTS—Acceptance Differing from Offer.—An acceptance that varies from the offer in any substantial particular cannot be deemed an acceptance of the offer, but is an independent proposal.—Metropolitan Coal Co. v. Boutell Transportation & Towing Co , Mass., 70 N. E. Rep. 421.

32. CONTRACTS—Construction.—Contract for sale of corn "on Kansas City weights and grades" held ambiguous, and open to parol construction.—Fort Grain Co. v. Hubby & Gorman, Tex., 79 S. W. Rep. 363.

33. CONTRACTS—Parol Modification.—A written contract, not required to be in writing, may be changed by oral agreement.—Strahl v. Western Grocery Co., Neb., 98 N. W. Rep. 1043.

34. CORPORATIONS—Application for Receiver by Stockholders.—In view of Rev. St. 1895, arts. 749d, 749e, 4864, 5259, petition by domestic stockholders of foreign corporation for appointment of a receiver held not to warrant *ex parte* order making appointment. — American Tribune New Colony Co. v. Schuler, Tex., 79 S. W. Rep. 370.

35. CORPORATIONS—Conspiracy to Injure.—An action at law cannot be maintained by a stockholder of a corporation for conspiracy to injure the corporation.—Converse v. United Shoe Machinery Co., Mass., 70 N. E. Rep. 444.

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37. COUNTIES—Allowance of County Treasurer Fees.—The fact that county commissioners have settled with a county treasurer, allowing fees in excess of the statutory limit, does not render the county commissioners liable for such excess.—Otoe County v. Dorman, Neb., 98 N. W. Rep. 1064.

38. CREDITOR'S BILL—Waiver of Other Remedies.—Creditors, who prove on interest coupons and collateral in insolvency proceedings, cannot thereafter maintain attachment proceedings in another state to reach the principal of their debt.—Gerding v. East Tennessee Land Co., Mass., 70 N. E. Rep. 206.

39. CREDITORS' SUIT—Attachment Lien.—A creditor, by the levy of an attachment on land, acquires a specific lien sufficient to support a creditors' bill for removing obstructions from the title.—Coulson v. Saltsman, Neb., 98 N. W. Rep. 1055.

40. CRIMINAL EVIDENCE—Books of United States Internal Revenue Collector.—Copy of entries in books of United States internal revenue collector, made by witness, held admissible in proceedings for violating local option law.—Terry v. State, Tex., 79 S. W. Rep. 319.

41. CRIMINAL EVIDENCE—Insanity.—A witness, testifying that the grandmother and mother of accused were insane, and a brother had fits and a very weak mind, could not give his opinion whether accused was sane.—Watts v. State, Md., 57 Atl. Rep. 542.

42. CRIMINAL EVIDENCE—Physician's Opinion as to Fatal Wound.—A physician attending a decedent may testify, in a prosecution for manslaughter, that a wound in his opinion, was fatal.—Sims v. State, Ala., 36 So. Rep. 138.

43. CRIMINAL LAW—Exception to Ruling.—An exception to the ruling in sustaining an objection to a question is not available, in the absence of a showing of what the answer would have been.—Mullins v. Commonwealth, Ky., 79 S. W. Rep. 258.

44. CRIMINAL TRIAL—Admissibility of Statement of Co-conspirator.—On a trial for conspiracy, a conversation in furtherance of the common design, but not in defendant's presence, by one engaged in the conspiracy, though not named in the indictment, is admissible.—Graff v. People, Ill., 70 N. E. Rep. 299.

45. CRIMINAL TRIAL—Embezzlement.—On prosecution for embezzlement, held not error not to submit to jury an issue raised by demurrer to plea of former acquittal.—State v. Laughlin, Mo., 79 S. W. Rep. 401.

46. DAMAGES—Contracts.—An assignment that damages are excessive presents no question for consideration in an action arising on contract—Connor v. Andrews' Land, Home & Improvement Co., Ind., 70 N. E. Rep. 376.

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48. DAMAGES—Medical Services an Element.—An instruction authorizing a recovery for the reasonable value of medical services, in a suit for damages by reason of injuries to plaintiff's wife, held not objectionable on the ground that there was no proof that the physician's charge was reasonable.—Abbitt v. St. Louis Transit Co., Mo., 79 S. W. Rep. 496.

49. DAMAGES—Unchastity as an Element Affecting Damages.—In an action for injuries to a passenger, evidence that plaintiff's reputation for chastity was bad, held incompetent on the question of damages.—St. Louis & S. F. R. Co. v. Smith, Tex., 79 S. W. Rep. 340.

50. DEATH—Action for Damages by Next of Kin.—The presumption that a wife and children sustain a pecuniary loss by the death of the husband and father does not obtain in the case of next of kin, who are in no wise pecuniarily dependent upon the decedent.—Cleveland, C. C. & St. L. Ry. Co. v. Drumm, Ind., 70 N. E. Rep. 286.

51. DEEDS—Construction.—A deed containing a reservation of a life estate in the grantor held not objectionable as testamentary instrument not properly executed.—Dozier v. Toalson, Mo., 79 S. W. Rep. 420.

52. DESCENT AND DISTRIBUTION—Avoidance of Ancestor's Deed.—An heir takes only such title as his ancestor had at the time of his death, and can avoid a deed made by the ancestor only when it could have been avoided by him.—Coulson v. Coulson, Mo., 79 S. W. Rep. 473.

53. DESCENT AND DISTRIBUTION — Creditor's Bill.—Under the decedent's law, a nonresident, who claims a life interest in lands under a will which has not been probated in the state, is not a necessary party to a suit to subject the land to the payment of the claims of creditors.—Coulson v. Saltsman, Neb., 98 N. W. Rep. 1055.

54. DESCENT AND DISTRIBUTION—Heir's Liability for Debts. — Where children received funds from their father's estate as creditors, and not as heirs, they were not bound by the father's knowledge of a claim not presented against his estate, in a suit to compel them to refund.—Hill v. Mayer, Ky., 79 S. W. Rep. 276.

55. DIVORCE — Personal Service. — Where personal service is not practicable, return should be made "Service waived," signed by defendant's attorney, except in divorce cases, where sheriff should return *non est*.—Palmer v. Palmer, Del., 57 Atl. Rep. 533.

56. DOWER—Lease.—An unassigned dower interest in land is not a subject of a leasehold contract conveying any interest in the lands.—Jackson v. O'Rorke, Neb., 98 N. W. Rep. 1068.

57. DRAINS—Assessing Land in Another County.—The circuit court of the county in which is a ditch, and in which proceedings to establish it originated, held to have jurisdiction to assess benefits to lands in another county benefitted thereby.—State v. Elliott, Ind., 70 N. E. Rep 397.

58. EASEMENTS—Drain for Surface Water.—A drain for a dwelling and for surface water would not be held to have passed as an easement by implied grant, in the absence of evidence of its necessity.—McSweeney v. Commonwealth, Mass., 70 N. E. Rep. 429.

59. ELECTIONS—Necessity of Exhibiting Poll Tax.—It is not necessary that a voter, subject to a poll tax, ex-

nibit his poll tax receipt to the managers of the election or file an affidavit that the receipt is lost.—Stinson v Gardner, Tex., 79 N. W. Rep. 354.

60. EMINENT DOMAIN—Abandonment of Improvement after Condemnation Proceedings.—A city, after verdict in proceedings to condemn land for a street, held authorized to dismiss the proceedings and abandon the improvement—City of Chicago v. Goodwillie, Ill., 70 N. E. Rep. 228.

61. EMINENT DOMAIN—Elevated Railroad.—Action for damages to abutting property owners from the construction of an elevated railroad in the street held barred by limitations of five years.—De Geofroy v. Merchants' Bridge Terminal Ry. Co., Mo., 78 S. W. Rep. 386.

62. EMINENT DOMAIN—Items Considered in Determining Damages of Property Condemned.—In determining damages to business caused by carrying out St. 1895, p. 573, ch. 488, § 14, relative to metropolitan water supply, value of good will of business is not ascertainable as matter of law as to many years' purchase of average annual net profits of business.—Sawyer v. Commonwealth, Mass., 70 N. E. Rep. 438.

63. ENTRY, WRIT OF—Action for Recovery of Land.—The title under a mortgage foreclosure claimed by a tenant in a writ of entry to recover real estate held unaffected by a deed to him.—Carlisle v. Libby, Mass., 70 N. E. Rep. 423.

64. EQUITY—Agreement Not to Sue.—Remedy for violation of agreement not to sue is by cross-action at law, and such remedy is adequate, unless person who made agreement is insolvent.—Headley v. Leavitt, N. J., 57 Atl. Rep. 510.

65. ESTOPPEL—Acquiescence in Railroad Construction.—Owner of land held estopped by acquiescence to recover possession of land from railroad.—Indiana Ry Co. v. Morgan, Ind., 70 N. E. Rep. 368.

66. EVIDENCE—Agency of Wife in Purchasing Goods.—Husband's liability for goods purchased by the wife held to depend on whether she acted within the scope of her ostensible or actual agency.—Johnson v. Briscoe, Mo., 79 S. W. Rep. 498.

67. EVIDENCE—Alienation of Affection.—In an action by a wife for alienation of her husband's affection, she is entitled to damages for injury to her character.—Linck v. Linck, Mo., 79 S. W. Rep. 478.

68. EVIDENCE—Deceased Witness.—Testimony of deceased witness, taken before a referee who died before the evidence was finally submitted, held admissible on subsequent hearing before another referee.—Taft v. Little, N. Y., 70 N. E. Rep. 211.

69. EVIDENCE—Hypothetical Questions.—A party examining an expert may put his hypothetical case as he claims it has been proven leaving the opposite party to so change it so as to present the facts contended by him.—City of Aledo v. Honeyman, Ill., 70 N. E. Rep. 338.

70. EVIDENCE—Official Deed Books.—In an action to recover part of a street, official deed books held admissible as original evidence of title.—Davis v. City of Clinton, Ky., 79 S. W. Rep. 259.

71. EVIDENCE—Reputation.—In an action for injuries, the fact that plaintiff was a prostitute could not be proved by evidence of general reputation.—St. Louis & S. F. R. Co. v. Smith, Tex., 79 S. W. Rep. 340.

72. EVIDENCE—Photographs of Defective Highway.—Photographs of the place of the accident held admissible, in connection with the other evidence.—City of Huntington v. Lusch, Ind., 70 N. E. Rep. 402.

73. EVIDENCE—Written Contract.—Where out of the price of a chose in action the assignor agreed to discharge an obligation against the same, his agreement may be shown by parol.—Bell v. Williamson, Neb., 98 N. W. Rep. 1049.

74. EXCHANGE OF PROPERTY—Marshaling Assets and Securities.—Where parties have exchanged lands, a mortgage thereafter executed by one of the parties is superior to an equitable lien of the other arising from a breach of the contract of exchange.—Griffin v. Gingell, Ky., 79 S. W. Rep. 284.

75. EXCEPTIONS, BILL OF—Signing Within the Time Limit.—A bill of exceptions, not signed within the term or within the time limited, cannot be considered on appeal, though appellant's failure resulted from the trial judge's absence from the state.—Lengelson v. McGregor, Ind., 70 N. E. Rep. 248.

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77. EXECUTORS AND ADMINISTRATORS—Duress.—It is not duress of an administratrix and her counsel for a creditor of the estate to threaten to file objections to the sale of real estate and an application for the administratrix's removal.—Wiggenhorn v. Fitzgerald, Neb., 98 N. W. Rep. 1079.

78. FRAUD—Deception as to Number of Acres Conveyed.—A vendee need not rescind the contract to recover damages sustained by fraudulent representations as to the number of acres conveyed.—Ludwick v. Petrie, Ind., 70 N. E. Rep. 280.

79. FRAUDS, STATUTE OF—Parol Contract of Sale of Land.—A purchaser of land under a parol contract held entitled to a deed on compliance with the terms of the contract.—Elsbury v. Shull, Ind., 70 N. E. Rep. 287.

80. FRAUDS, STATUTE OF—Prenuptial Parol Contract.—A prenuptial parol contract as to the rights of the parties in the realty of each other is void.—Steen v. Kirkpatrick, Miss., 36 So. Rep. 140.

81. FRAUDULENT CONVEYANCES—Assignment of Notes to Wife.—An assignment of a judgment and certain notes for the price of land by a husband to his wife held fraudulent as to the husband's creditors.—Planters' Bank & Trust Co. v. Major, Ky., 79 S. W. Rep. 264.

82. FRAUDULENT CONVEYANCES—Rents and Profits of Land.—A clause in a trust deed, conveying all the rents and profits of the lands as long as there shall remain unpaid any balance of the indebtedness secured, does not vitiate the deed.—Melton v. P. P. Williams Co., Miss., 36 So. Rep. 152.

83. GAS—Duty of Company to Supply Dwelling.—Obligation of gas company to supply dwelling with gas, lay down supply pipe, and furnish meter is subject to limitation of reasonable expectation of sufficient consumption to warrant expenditure.—Public Service Corp. v. American Lighting Co., N. J., 57 Atl. Rep. 482.

84. GUARANTY—Payment of Rent.—A guaranty of payment of rent, under seal, imports a consideration sufficient to support it, whether executed concurrently with or after the signing of the lease.—Roth v. Adams, Mass., 70 N. E. Rep. 445.

85. GUARDIAN AND WARD—Suit Against Foreign Testamentary Guardian.—It is sufficient, in suit by resident guardian against a foreign testamentary guardian for check payable to him to produce his appointment as testamentary guardian.—Boyle v. Griffin, Miss., 36 So. Rep. 141.

86. HOMESTEAD—Loan for Improvement.—A loan made by a building association held not a loan for an improvement of a homestead.—Steger v. Traveling Men's Building & Loan Assn., Ill., 70 N. E. Rep. 236.

87. HOMESTEAD—Dying Declaration.—Dying declarations, made while the decedent entertained some hope of recovery, are nevertheless admissible, where, after having abandoned all such hope, he reaffirmed their correctness.—Sims v. State, Ala., 36 So. Rep. 188.

88. HOMICIDE—Self-Defense.—In a prosecution for homicide, a requested instruction on self-defense held not justified by the facts.—Spaulding v. State, Ind., 70 N. E. Rep. 243.

89. HUSBAND AND WIFE—Action by Wife for Personal Injuries.—In an action by a married woman for personal injuries, she cannot recover the value of medical serv-

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90. HUSBAND AND WIFE—Note to Husband.—A wife cannot become liable to her husband on a note, whether her relation to it is that of a maker or indorser.—National Bank of the Republic v. Delano, Mass., 70 N. E. Rep. 444.

91. INJUNCTION—Effect of an Appeal.—Where a circuit court on the merits dissolved an injunction and dismissed the plaintiff's bill, it had power to continue the temporary injunction in force, pending an appeal from such judgment. Rev. St. 1899, §§ 3630, 3637, 3649.—State v. Dearing, Mo., 79 S. W. Rep 454.

92. INTOXICATING LIQUORS—Sale in Violation of Law Causing Death.—Under Burns' Rev. St. 1901, § 285, an action could not be maintained for the death of a person, owing to his intoxication, by reason of liquor sold him by defendant in violation of law.—Couchman v. Prather, Ind., 70 N. E. Rep. 240.

93. JUDGMENT—Suspension and Vacation.—Where a judgment has been suspended, it is immaterial that a subsequent order setting it aside is void; the suspension being in effect a vacation.—Griffin v. Gingell, Ky., 79 S. W. Rep. 284.

94. JUSTICES OF THE PEACE—Injuries to Horses.—A complaint in a suit before a justice for injuries to horses left to defendant held not objectionable for want of facts.—Cunningham v. Dickerson, Mo., 79 S. W. Rep. 492.

95. LARCENY—Indictment Alleging Theft of Lawful Money.—Under an indictment charging theft of lawful current money of the United States, proof must show that the money was legal tender coin or currency.—Black v. State, Tex., 79 S. W. Rep. 311.

96. LIFE INSURANCE—Contract With Foreign Company.—A contract of insurance made in Texas held governed by the laws of New York, where the home office of the company was located.—Metropolitan Life Ins. Co. v. Bradley, Tex., 79 S. W. Rep. 867.

97. LIMITATION OF ACTIONS—Notice of Fraud in Procuring Deed.—Notice to grantors that their deed was procured from them by fraud is imputed to them as of the date of the recording thereof, so as to start limitations.—McDonald v. Bayard Sav. Bank, Iowa, 98 N. W. Rep. 1025.

98. LIVERY STABLE KEEPERS—Injury to Team Let to Defendant.—In a suit for injuries to a team let to defendant, the measure of damages held the difference in value of the team immediately before the letting and immediately after the return.—Cunningham v. Dickerson, Mo., 79 S. W. Rep. 492.

99. MALICIOUS PROSECUTION—Special Damages.—Loss of employment caused by an arrest may be shown as special damage in an action for malicious prosecution.—Stocker v. Nathanson, Neb., 98 N. W. Rep. 1061.

100. MANDAMUS—Collection of Railroad Aid Tax.—*Mandamus* will not lie to compel county commissioners to order the collection of a railroad aid tax, which they have been enjoined from enforcing.—State v. Board of Com'rs of Clinton County, Ind., 70 N. E. Rep. 373.

101. MASTER AND SERVANT—Death Due to Defective Appliance.—In an action for the wrongful death of a brakeman, the complaint held sufficient to show that the defendant had knowledge of defective appliances, or that they had existed for sufficient time to charge it with knowledge.—Cleveland, C., C. & St. L. Ry. Co. v. Lindsay, Ind., 70 N. E. Rep. 283.

102. MASTER AND SERVANT—Duty to Furnish Safe Implements.—An employer is bound to furnish his employee with reasonably safe implements with which to work.—Robbins v. Big Circle Min. Co., Mo., 79 S. W. Rep. 480.

103. MASTER AND SERVANT—Fellow-Servants.—The conductor of one car of a cable company is not engaged in the "particular business" in which the gripman on the following car is engaged, so as to make the two fellow-servants.—Chicago City Ry. Co. v. Leach, Ill., 70 N. E. Rep. 222.

104. MASTER AND SERVANT—Independent Contractor.—An owner of property to be improved by a contractor held not liable for contractor's failure to perform a contract duty to a workman in his employ.—Omaha Bridge & Terminal Co. v. Hargadine, Neb., 98 N. W. Rep. 1071.

105. MASTER AND SERVANT—Negligence for Jury to Determine.—It is for the jury to determine whether injuries were caused by defendant's negligence or by plaintiff's own negligence.—East Jellico Coal Co. v. Golden, Ky., 79 S. W. Rep. 291.

106. MASTER AND SERVANT—Safe Place to Work.—An employee held not bound to make an examination to determine whether the place where he was at work when injured was safe; the danger not being apparent on ordinary observation.—Barnett & Record Co. v. Schlapka, Ill., 70 N. E. Rep. 343.

107. MASTER AND SERVANT—Willful Torts of Servant.—A master can only be held liable for the willful wrongs of his servant when done on the master's account and within the servant's authority.—St. Louis Southwestern R. Co. of Texas v. Mayfield, Tex., 79 S. W. Rep. 365.

108. MASTER AND SERVANT—Walking on Tracks.—A station agent, who walks on a side track, rather than on the place between the tracks, provided by the company, while walking to the place where he transacts his business, assumes the risk.—Morehead v. Yazoo & M. V. R. Co., Miss., 36 So. Rep. 151.

109. MINES AND MINERALS—Notice of Forfeiture.—Fifteen days' notice held insufficient to authorize forfeiture of contract giving right to explore land for oil and gas.—Consumers' Gas Trust Co. v. Littler, Ind., 70 N. E. Rep. 363.

110. MONEY PAID—Pleading.—Count for money paid by plaintiff for defendant's benefit, failing to allege payment at defendant's request, held bad.—Massachusetts Mut. Life Ins. Co. v. Green, Mass., 70 N. E. Rep. 202.

111. MORTGAGES—Foreclosure Sale.—A mortgagor held estopped, as against the purchaser under the foreclosure decree, from asserting the invalidity of the sale.—State Mut. Building & Loan Ass'n v. O'Callaghan, N. J., 57 Atl. Rep. 496.

112. MORTGAGES—Personal Judgment.—In an action on a note secured by a lien on certain lands held in trust for the maker, where the trustee was not liable on the note, it was not error not to render personal judgment against the trustee.—Edmonston v. Carter, Mo., 79 S. W. Rep. 459.

113. MUNICIPAL CORPORATIONS—Knowledge of Defective Streets.—Where a city has knowledge of a dangerous obstruction in a street, it is bound to exercise ordinary care for the protection of the traveling public in giving warning of the danger.—City of Louisville v. Keher, Ky., 79 S. W. Rep. 270.

114. MUNICIPAL CORPORATIONS—Lien for Paving.—Municipal lien for paving held not invalid, because requiring contractor to keep pavement in repair for five years.—City of Philadelphia v. Pemberton, Pa., 57 Atl. Rep. 516.

115. MUNICIPAL CORPORATIONS—Notice of Defective Highway.—Whether a stump remained in a street long enough to charge the city authorities with notice, and whether it was adapted to frighten a horse, held questions for the jury.—City of Huntington v. Lusch, Ind., 70 N. E. Rep. 402.

116. NEGLIGENCE—Estoppel to Plead Warning on Freight Elevator.—Where defendant's foreman permitted an employee to ride on defendant's elevator, defendant could not escape liability by reliance on a warning to people to keep off the same.—Kentucky Distilleries & Warehouse Co. v. Leonard, Ky., 79 S. W. Rep. 281.

117. NEGLIGENCE—Injury to Railroad Passenger Causing Dizziness.—A passenger, injured in a railroad collision and suffering thereafter from dizziness, cannot recover for a broken wrist resulting from a fall occasioned by such an attack.—Snow v. New York, N. H. & H. R. Co., Mass., 70 N. E. Rep. 205.

118. NEW TRIAL—Absence of City Attorney.—Absence of city attorney in trial of action against city for personal injuries held not ground for new trial —City of Louisville v. Keher, Ky., 79 S. W. Rep. 270.

119. NEW TRIAL—Action Involving Title.—A suit held of such a nature that plaintiff was not entitled to a new trial as a matter of right, under the statute allowing new trials as matter of right in actions involving title to real estate, etc.—Hofferbert v. Williams, Ind., 70 N. E. Rep. 405.

120. OFFICERS—Decree Against, Binds Successor.—A decree against a public officer operates upon the office and binds his successor.—Board of Com'rs of Clinton County, Ind., 70 N. E. Rep. 373.

121. PARTNERSHIP—Money Borrowed in Firm Name by Surviving Partner.—Where a partnership existed, and the surviving partner executed a note for money borrowed in firm name, he was liable thereon, though the estate of the deceased partner was not liable.—Altgelt v. D. Sullivan & Co., Tex., 79 S. W. Rep. 333.

122. PERPETUITIES—Construction of Will.—A devise of a life estate, and after the death of the life tenant to his widow and children, is not a perpetuity, under Ky. St. 1903, § 2360.—Johnson's Trustee v. Johnson, Ky., 79 S. W. Rep. 293.

123. PLEDGES—Purchase of Pledged Property.—A payee of a note, holding shares of stock as collateral, held empowered to agree to take the stock, and other stock similarly held as collateral for another debt, in satisfaction of the debts.—Wetherell v. Johnson, Ill., 70 N. E. Rep. 229.

124. PRINCIPAL AND AGENT—Husband and Wife.—A letter from a husband to his wife held not to authorize her to bind him to pay $500 as penalty for failure to comply with a contract for the sale of the farm.—Michael v. Hoffstead, Neb., 98 N. W. Rep. 1078.

125. PROHIBITION—Parties.—The board of arbitration held not a proper party to an application for a writ of prohibition to restrain further proceedings against relators for refusing to appear and testify before the board. —State v. Ryan, Mo., 79 S. W. Rep. 429.

126. RAILROADS—Backing Train over Street.—It is negligence to back a railroad train over a street without signals or lookout.—Smith v. Pere Marquette R. Co., Mich., 98 N.W. Rep. 1022.

127. RAILROADS—Duty to Erect Bridge or Grade Crossing.—Railway company may be required to erect bridge or grade approaches for highway crossing, though the road was in operation before highway was laid out.—Illinois Cent. R. Co. v. Swalm, Miss., 36 So. Rep. 147.

128. RAILROADS—Liability of Receivers for Injury to Employee.—Receivers of a railroad company, after discharge, held relieved from personal liability for injuries to a fireman while the road was being operated by them. —Tobin v. Central Vermont Ry. Co., Mass., 70 N. E. Rep. 431.

129. RAILROADS—Presumption of Due Care at Railroad Crossing.—The presumption that a traveler at a railway crossing exercised due care is inapplicable, when the circumstances of the accident are detailed by eyewitnesses. —Reed v. Queen Anne's R. Co., Del., 57 Atl. Rep. 529.

130. RAILROADS—Speed of Train.—Where a city ordinance limits the speed of trains within the city to five miles an hour, running a train in the city at a greater rate of speed is negligence.—Murrell v. Missouri Pac. Ry. Co., Mo., 79 S. W. Rep. 505.

131. RELEASE—Joint Tort Feasors.—Acceptance by one who has a cause of action against two tort-feasors of a sum in consideration of a release of the tort-feasor making the payment does not preclude recovery against the other.—Louisville & Evansville Mail Co., v. Barnes' Adm'r, Ky., 79 S. W. Rep. 261.

132. RELIGIOUS SOCIETIES—Expulsion of Member.—The courts will review the judgments of the governing authorities of a religious corporation, to inquire whether a church tribunal which expels a member, has been organized in conformity with the constitution of the church and whether a member is disqualified under the rules of such church from sitting as a judge in the case. —Bonacum v. Murphy, Neb., 98 N. W. Rep. 1030.

133. RELIGIOUS SOCIETIES—Trustees' Consent in Removing Church Property.—The consent of trustees in possession of property is necessary to authorize its removal.—Alexander v. Bowers, Tex., 79 S. W. Rep. 342.

134. REMOVAL OF CAUSES—Subsequent Action in State Court.—Removal of a case to the federal court, where it was dismissed without prejudice, held not to deprive the state court of jurisdiction of a subsequent action on the same cause of action.—DeWitt v. Chesapeake & O. R. Co., Ky., 79 S. W. Rep. 275.

135. SALES—Implied Warranty.—In the sale of an existing chattel, there is not, in the absence of fraud, any implied warranty of good quality or condition of the chattel.—Telluride Power Transmission Co. v. Crane Co., Ill., 70 N. E. Rep. 319.

136. SALES—Parol Collateral Agreement as to Security for Payment.—Where a buyer of bricks agreed in writing to give a good and sufficient bond for the price, evidence that, before the contract was signed, the seller had agreed to accept other security, held immaterial.—O'Brien v. Higley, Ind., 70 N. E. Rep. 242.

137. SALES—Trustee ex Maleficio.—One who by agreement purchases land at foreclosure for the benefit of the owner hold a trustee *ex maleficio*.—Dickson v. Stewart, Neb., 98 N. W. Rep. 1085.

138. SPECIFIC PERFORMANCE—Contract to Convey Land. —A complaint in an action for specific performance of a contract to convey land, which states the facts showing the performance of the conditions imposed on plaintiff, is sufficient.—Elsbury v. Shull, Ind., 70 N. E. Rep. 287.

139. SPECIFIC PERFORMANCE—Enhancement in Value. —Mere enhancement in value before performance of land contract is sought by vendee held not ground for refusing performance.—Harris v. Greenleaf, Ky., 79 S. W. Rep. 267.

140. SPECIFIC PERFORMANCE—Mutuality of Contract. —Want of mutuality is no defense to specific performance, where the party not bound has performed all the conditions of the contract.—Dickson v. Stewart, Neb., 98 N. W. Rep. 1085.

141. SPECIFIC PERFORMANCE—Vendee's Failure to Make Payments.—That, after a vendee in a contract for the sale of land has defaulted, there has been a considerable increase in the value of the land, may authorize denial of specific performance.—Boldt v. Early, Ind., 70 N. E. Rep. 271.

142. SUBSCRIPTIONS—Consideration.—Subscription to parish, for the purpose of paying off debt thereof, held to be supported by a sufficient consideration, in action to recover amount due thereon.—Robinson v. Nutt, Mass., 70 N. E. Rep. 198.

143. STREET RAILROADS—Duty to Children on Cars.—A street railroad owes a child of tender years the duty of exercising ordinary care to prevent him from going into a place of danger on its car.—Denison & S. Ry. Co. v. Carter, Tex., 79 S. W. Rep. 320.

144. STREET RAILROADS—Failure to Look and Listen. —Where a pedestrian, injured by a street car, testified that she neither saw nor heard the car, she was not entitled to recover on the ground that the car was running at an illegal rate of speed.—Reno v. St. Louis & Suburban Ry. Co., Mo., 79 S. W. Rep. 464.

145. STREET RAILROADS—Injury to Pedestrian at Crossing.—One crossing a street at a crossing is not a trespasser on the tracks of a street railway, but has a right

equal to that of the street railway to the use of the street.—Riska v. Union Depot R. Co., Mo., 79 S. W. Rep. 445.

146. STREET RAILROADS—Vigilant Watch Ordinance.—A vigilant watch ordinance need not be accepted by a street car company in order to bind it.—Nagel v. St. Louis Transit Co., Mo., 79 S. W. Rep. 502.

147. TAXATION—Board of Equalization.—Whether defendant in an action to recover taxes appeared before the board of equalization for years during which the assessor's valuation was not increased held immaterial.—Albin Co. v. City of Louisville, Ky., 79 S. W. Rep. 274.

148. TAXATION—Review of Assessment.—The courts cannot review the decision of the board of review as to the real value of property assessed, merely on the ground that the value fixed by the board is too great.—Weber v. Baird, Ill., 70 N. E. Rep. 231.

149. TAXATION—Stocks and Bonds Held by Agents Elsewhere.—Stocks and bonds belonging to a resident of the county held taxable there, though held by agents in another state.—Appeal of Borden, Ill., 70 N. E. Rep. 310.

150. TAXATION—Tax Sale.—A sale of property, not assessed in the name of the owner, held invalid.—Boagni v. Pacific Imp. Co., La., 36 So. Rep. 129.

151. TRESPASS—Pleadings.—The answer of defendant in trespass on land held not to require a reply to put the matter of ownership in issue.—Cravens v. Despain, Ky., 79 S. W. Rep. 276.

152. TRESPASS TO TRY TITLE—Title by Avulsion.—Defendant, though a trespasser, in trespass to try title, may, under the plea of not guilty, show that a river forming plaintiff's boundary had, through avulsion, changed its channel.—Rodriguez v. Hernandez, Tex., 79 S. W. Rep. 343.

153. TRIAL—Duty to Ask Instructions.—In civil cases the circuit court is not required to give the whole law of the case to the jury in its instructions; but it is incumbent on litigants to ask such instructions as they deem proper.—City of Louisville v. Keher, Ky., 79 S. W. Rep. 270.

154. TRIAL—Instructions Where Case Tried Without Jury.—Where trial is before court without a jury, declaration that plaintiff was not entitled to recover is not a withdrawal by the court from itself of a consideration of the evidence.—Kansas City v. Askew, Mo., 79 S. W. Rep. 483.

155. TRIAL—Relevancy of Books of Account.—Debtor's books of account held properly excluded, in action by creditor against third person on promise to pay debt.—Flag v. Fisk, 87 N. Y. Supp. 530.

156. TRIAL—Showing Jurors That Defendant has Liability Insurance.—Conveying to the jurors, in the cross-examination of a witness for defendant, the information that defendant was insured against loss, constitutes reversible error.—Lassig v. Barsky, 87 N. Y. Supp. 425.

157. TRIAL—Unconstitutional Statute.—Where a statute has been declared unconstitutional by the supreme court, the judge should not, on request, charge the same as law.—Ballentine v. Hammond, S. Car., 46 S. E. Rep. 1000.

158. TRUSTS—Evidence to Establish.—In order to establish a trust, the evidence must be clear and satisfactory, not only as to its existence, but as as to its terms and conditions.—Lurie v. Sabath, Ill., 70 N. E. Rep. 323.

159. USE AND OCCUPATION—Right to Rent.—A reservation in a sale of premises of the right of the vendor to use part thereof for a limited time held not subject to any duty to pay for the use.—Becker v. Davis, 87 N. Y. Supp. 422.

160. USURY—Sale Under Trust Deed.—Where grantor in a usurious deed of trust has conveyed the property and sues to enjoin its sale under the deed, the jurisdiction to enjoin rests on the inherent power of the court to give complete relief between the parties.—Rorer v. Boston Nat. Bldg. & Loan Ass'n, W. Va., 46 S. E. Rep. 1013.

161. WATERS AND WATER COURSES—Right to Flowage—Where a mill site is conveyed in consideration of the erection of a mill, it is a sufficient consideration for a parol agreement to allow the flowage of the grantor's land.—Johnson v. Sherman County Irrigation, Water Power & Improvement Co., Neb., 98 N. W. Rep. 1096.

162. WATERS AND WATER COURSES—Riparian Owners.—A lower riparian owner cannot fight off flood water of a stream, just as he would surface water, when it has left its natural channel.—Ballentine v. Hammond, S. Car., 46 S. E. Rep. 1000.

163. WATERS AND WATER COURSES—Waterworks Company.—A town, purchasing waterworks company organized under St. 1886, p. 186, ch. 240, for supplying water to the town, and limiting the sources of water supply, held limited to the same sources as the company which it purchased.—Smith v. Town of Stoughton, Mass., 70 N. E. Rep. 195.

164. WILLS—Naked Power of Disposition.—A naked power of disposition under a will may exist, exclusive of any beneficial interest in the donee.—Hammond v. Croxton, Ind., 70 N. E. Rep. 368.

165. WILLS—Naked Powers to Executors.—Under will giving executor naked power to sell after widow's death, title vested in heirs, and their vendee had right to protect his interest during life of widow.—Indiana Ry. Co. v. Morgan, Ind., 70 N. E. Rep. 368.

166. WILLS—Perpetuities.—Portion of will void as perpetuity and as exemption from debts segregated, and other provisions allowed to stand.—Johnson's Trustee v. Johnson, Ky., 79 S. W. Rep. 293.

167. WITNESSES—Competency of Husband or Wife.—Under Rev. Laws, ch. 175, § 20, subd. 2, husband or wife may, if willing, testify against other in criminal proceeding, irrespective of want of consent of one on trial.—Commonwealth v. Barker, Mass., 70 N. E. Rep. 203.

168. WITNESSES—Competency of Wife in Bankruptcy Proceedings.—The Pennsylvania statute of 1887, P. L. 158, §2b, which forbids husband and wife to testify "against each other," does not render the testimony of a wife incompetent in support of a claim filed by her against her husband's estate in bankruptcy.—*In re* Domenig, U. S. D. C., E. D. Pa., 128 Fed. Rep. 146.

169. WITNESSES—Evidence at Former Hearing.—Where a witness was cross examined as to part of his testimony at a coroner's inquest, the counsel for the opposite party was entitled to introduce the balance of the witness' statement on such subject.—Sexton v. Onward Const. Co., 87 N. Y. Supp. 550.

170. WITNESSES—Impeachment.—A witness cannot be impeached by the testimony of an officer that he had arrested the witness for a criminal offense.—Mullins v. Commonwealth, Ky., 79 S. W. Rep. 258.

171. WITNESSES—Incompetency.—Incompetency of a witness held waived by a failure to object until after prejudicial evidence had been brought out on cross-examination.—Ladd v. Williams, Mo., 79 S. W. Rep. 511.

172. WITNESSES—Refreshing Memory From Memorandum.—In order to refresh his memory, a witness may use memoranda as to certain items of work and materials made by another and proved to be correct.—Taft v. Little, N. Y., 70 N. E. Rep. 211.

173. WITNESSES—Self-Serving Declarations.—Self-serving declaration by treasurer of company, whose contracts were secured by bond, held inadmissible in action on bond.—Graham v. Middleby, Mass., 70 N. E. Rep. 416.

174. WITNESSES—Testimony of Party's Own Witnesses. A party to a suit is not bound by the testimony of his witness, so as to preclude him from relying on a different state of facts from those testified to.—Holland v. St. Louis & S. F. R. Co., Mo., 79 S. W. Rep. 508.

175. WITNESSES—Wife of Co-Indictee.—Allowing wife of one jointly indicted with defendant, but who pleaded guilty before the trial to testify, is not error.—Grist v. People, Ill., 70 N. E. Rep. 299.